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No. 09-11556

Supreme Court, U.S.
FILED
JAN 12 2011
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

JOSE TOLENTINO,

Petitioner,

v.

STATE OF NEW YORK,

Respondent.

ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF NEW YORK

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED JUNE 23, 2010
CERTIORARI GRANTED NOVEMBER 15, 2010

238072

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644 a
(114)

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APPENDIX A — CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

JOSE TOLENTINO *v.* STATE OF NEW YORK

New York County Criminal Court

1/2/2005 Complaint charging Aggravated Unlicensed Operation of a Motor Vehicle in the First Degree and Unlicensed Driving filed.

New York County Supreme Court

4/19/2005 Indictment charging Aggravated Unlicensed Operation of a Motor Vehicle in the First Degree filed.

5/11/2005 Petitioner arraigned on Indictment. Voluntary Disclosure Form filed.

5/26/2005 Omnibus Motion, including Motion to Suppress filed.

6/22/2005 Affirmation in Response to Omnibus Motion filed.

7/12/2005 Decision and Order of Hon. Rena K. Uviller on Omnibus Motion entered.

8/3/2005 Guilty Plea to Aggravated Unlicensed Operation of a Motor Vehicle in the First Degree entered.

9/28/2005 Petitioner sentenced to five years of probation. Judgment entered.

9/28/2005 Notice of Appeal filed.

New York State Supreme Court, Appellate Division, First Department

6/30/2008 Appellant Brief filed.

1/6/2009 Respondent Brief filed.

2/3/2009 Submitted to Court for Decision.

2/24/2009 Decision affirming Order and Judgment of New York County Supreme Court issued.

New York Court of Appeals

5/14/2009 Order of Hon. Jonathan Lippman, Chief Judge, granting Leave to Appeal entered.

8/3/2009 Appellant Brief filed.

10/1/2009 Respondent Brief filed.

10/23/2009 Reply Brief filed.

2/10/2010 Oral Argument held.

3/30/2010 Decision affirming Order of the Appellate Division issued.

APPENDIX B — FELONY COMPLAINT, FILED JANUARY 2, 2005

CRIMINAL COURT OF THE
CITY OF NEW YORK
COUNTY OF NEW YORK

FELONY
ADA LI
212-335-9174

THE PEOPLE OF THE STATE OF NEW YORK

-against-

1. Jose Tolentino (M 43)

Defendant.

Police Officer Ronald Marto, shield 18399 of the 034 Precinct, states as follows:

On January 1, 2005, at about 20:01 hours at in the County and State of New York, the Defendant committed the offenses of:

1. VTL511(3)(a)(ii)	Aggravated Unlicensed Operation in the First Degree (1 count)
2. VTL509(1)	Unlicensed Driving (1 count)

the defendant operated a motor vehicle upon a public highway while having reason to know that his license or privilege of operating such vehicle in this state or his privilege of obtaining such a license was suspended or revoked and while having in effect ten or more suspensions imposed on at least ten separate dates for failure to answer, appear or pay an authorized fine; and the defendant operated a motor vehicle upon a public highway without being duly licensed.

The offenses were committed under the following circumstances:

Deponent states that he observed the defendant operating a motor vehicle (the key was in the ignition, the engine was running and defendant was behind the wheel) on a public highway, to wit Broadway and 181st Street. Deponent conducted a computer check of the records of the New York State Department of Motor Vehicles which revealed that defendant's driver's license was suspended on more than six times on more than twenty dates and has not been reinstated. Deponent's basis for believing that defendant had reason to know his/her license was suspended or revoked is as follows: the computer check revealed that defendant's license was suspended for failure to answer a New York summons and all such summons have printed on them, "If you do not answer this ticket by mail within fifteen (15) days your license will be suspended." The suspension occurs automatically (by computer) within 4 weeks of the defendant's failure to answer summons.

Appendix B

False statements made herein are punishable as a class A misdemeanor pursuant to section 210.45 of the penal law.

/s/	01/01/05 2330
Deponent	Date and Time

APPENDIX C — INDICTMENT, FILED APRIL 19, 2005

SUPREME COURT OF THE
STATE OF NEW YORK
COUNTY OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK

-against-

JOSE TOLENTINO,

Defendant.

THE GRAND JURY OF THE COUNTY OF NEW YORK, by this indictment, accuse the defendant of the crime of **AGGRAVATED UNLICENSED OPERATION OF A MOTOR VEHICLE IN THE FIRST DEGREE**, in violation of Vehicle and Traffic Law §511(3)(a)(ii), committed as follows:

The defendant, in the County of New York, on or about January 1, 2005, operated a motor vehicle while having in effect ten or more suspensions, imposed on at least ten separate dates for failure to answer, appear and pay a fine, pursuant to subdivision three of section two hundred twenty-six and subdivision four-a of section five hundred ten of the Vehicle and Traffic Law.

ROBERT M. MORGENTHAU
District Attorney

APPENDIX D — VOLUNTARY DISCLOSURE FORM, FILED MAY 11, 2005

SUPREME COURT OF THE
STATE OF NEW YORK
COUNTY OF NEW YORK

Docket No. 2005NY000685

THE PEOPLE OF THE STATE OF NEW YORK

-against-

Jose Tolentino,

Defendant.

PEOPLE'S VOLUNTARY DISCLOSURE FORM

The People of the State of New York hereby voluntarily disclose to the defendant the following factual information pertaining to the above-captioned case:

A. *BILL OF PARTICULARS*

1. *OCCURRENCE*

Date: January 1, 2005
App. Time: 7:40 p.m.
Place: Broadway & 181st Street

Appendix D

2. *ARREST*

Date: January 1, 2005
App. Time: 10:00 p.m.
Place: 34th Precinct

B. ***NOTICES***

1. *STATEMENTS*

[X] If checked, notice is hereby served, pursuant to CPL §710.30(1)(a), that the People intend to offer at trial evidence of a statement made by defendant to a public servant. *(Where a statement has been video taped, counsel should contact the assigned Assistant District Attorney to arrange a mutually convenient time for viewing the tape or should provide a blank tape for copying.)*

Statement #: 1

Date: January 1, 2005
Approximate Time: 7:40 pm
Location: Broadway & 181st Street
Individual Made To: PO Trinidad & PO Marto
Substance of Statement: I don't have a NYS driver's license.

2. *IDENTIFICATION*

[ ] If checked, notice is hereby served, pursuant to CPL §710.30(1)(b), that the People intend to offer

at trial testimony regarding an observation of defendant either at the time or place of the commission of the offense or upon some other occasion relevant to the indictment, to be given by a witness who has previously identified defendant.

C. *DISCOVERY*

1. *ADDITIONAL STATEMENTS*

[ ] If checked, the People hereby disclose written, oral or recorded statements of a defendant or of a co-defendant to be jointly tried, made, other than in the course of the criminal transaction, to a public servant engaged in law enforcement activity or to a person then acting under his direction or in cooperation with him, and which statements are not given in section B(1) above. C.P.L. §240.20(1)(a).

2. *GRAND JURY TESTIMONY*

[ ] If checked, defendant or a co-defendant to be tried jointly testified before the Grand Jury relating to this criminal action. C.P.L. §240.20(1)(b). *Such testimony is available upon payment of a stenographic fee.*

3. *SCIENTIFIC AND MEDICAL REPORTS*

[ ] If checked, the People hereby disclose written reports or documents or portions thereof, concerning a physical or mental examination or

scientific test or experiment, relating to this criminal action, which were made by, or at the request or direction of a public servant engaged in law enforcement, or by a person whom the People intend to call as a witness of a trial, or which the People intend to introduce at trial. C.P.L. §240.20(1)(c).

4. *PHOTOGRAPHS AND DRAWINGS*

[ ] If checked, there exists photographs or drawings relating to this criminal action which were made or completed by a public servant engaged in law enforcement, or which were made by a person whom the People intend to call as a witness at trial, or which the People intend to introduce at trial. C.P.L. §240.20(1)(d). *(Counsel should contact the assigned Assistant District Attorney to arrange a mutually convenient time to examine this material.)*

5. *INSPECTION OF PROPERTY*

[ ] If checked, there exist photographs, photocopies or other reproductions made by or at the direction of a police officer, peace officer or prosecutor of property prior to its release pursuant to the provisions of Penal Law Section 450.10, irrespective of whether the People intend to introduce at trial the property or the photograph, photocopy or other reproduction. C.P.L. §240.20(1)(e). *(Counsel should contact the assigned Assistant District Attorney to arrange a mutually convenient time to examine this property.)*

Appendix D

6. *OTHER PROPERTY*

[ ] If checked, there exists other property obtained from the defendant, or a co-defendant to be tried jointly, C.P.L. §240.20(1)(f), or from another source. *(Counsel should contact the assigned Assistant District Attorney to arrange a mutually convenient time to examine this property.)*

7. *TAPES AND ELECTRONIC RECORDINGS*

[ ] If checked, there exist tapes or other electronic recordings which the People intend to introduce at trial, irrespective of whether such recording was made during the course of the criminal transaction. C.P.L. §240.20(1)(g). *(Counsel should contact the assigned Assistant District Attorney to arrange a mutually convenient time to listen to the tapes or provide a blank tape for copying.)*

8. *BRADY MATERIAL*

[ ] If checked, there is material appended which the People are required to turn over pursuant to the United States or the New York State Constitution. The People are aware of their continuing obligation to disclose material exculpatory information to defendant and intend to satisfy that obligation as required by law. C.P.L. §240.20(1)(h).

Appendix D

9. *COMPUTER OFFENSES*

[ ] If checked, discovery is hereby served pursuant to C.P.L. §240.20(1)(j) of the time, place and manner of notice given pursuant to Penal Law §156.00(6), which governs offenses for Unauthorized Use of a Computer (Penal Law §156.05) and Computer Trespass (penal Law §156.10).

10. *POLICE OFFICERS INVOLVED*

The following are some of the officers who were involved in the arrest or police investigation.

Name	*Shield*	*Command*
Ronald Marto	18399	34 Precinct
Antonio Trinidad	15630	34 Precinct
Thomas Carroll		34 Precinct

11. *SEARCH WARRANTS*

[ ] If checked, a search warrant was executed during the investigation of this case.

D. ***DEMAND FOR NOTICE OF ALIBI***

Pursuant to CPL §250.20, the People hereby demand that defendant supply the District Attorney with (a) the place or places where the

defendant claims to have been at the time of the commission of the crime(s) and (b) the names, residential addresses, places of employment and addresses thereof of every alibi witness upon whom defendant intends to rely to establish his presence elsewhere than at the scene of the crime at the time of its commission. Within a reasonable time after the receipt of the information specified above, the District Attorney will submit a list of any rebuttal witnesses, their addresses, and employers.

E. ***RECIPROCAL DISCOVERY***

Pursuant to CPL §240.30(1), the People hereby demand that defendant supply the District Attorney with (a) any written report or document, or portion thereof, concerning a physical or mental examination, or scientific test, experiment, or comparisons, made by or at the request or direction of the defendant, if the defendant intends to introduce such report or document at trial, or if defendant has filed a notice of intent to proffer psychiatric evidence and such report or document which relates thereto or if such report or document was made by a person other than defendant, whom defendant intends to call as a witness at trial; and (b) any photograph, drawing, tape, or other electronic recording which the defendant intends to introduce at trial.

NOTE: Any defense motion or request addressed to the above-captioned case should be directed to the attention

of the Assistant District Attorney named below, who is assigned to this case.

Dated: New York, New York
April 11, 2005

Robert M. Morgenthau
District Attorney
One Hogan Place
New York, NY 10013

By: Joanne Li
Assistant District Attorney
335-9174

APPENDIX E — NOTICE OF OMNIBUS MOTION INCLUDING MOTION TO SUPPRESS, FILED IN NEW YORK COUNTY SUPREME COURT ON MAY 26, 2005

SUPREME COURT OF THE
STATE OF NEW YORK

COUNTY OF NEW YORK: PART 72

IND. NO.: 1982-2005

THE PEOPLE OF THE STATE OF NEW YORK

-against-

JOSE TOLENTINO,

Defendant.

NOTICE OF OMNIBUS MOTION

PERSONS:

PLEASE TAKE NOTICE, that upon the annexed affirmation of GERARD M. DEENIHAN, ESQ., an attorney duly admitted to practice law in the State of New York, the annexed exhibits and the prior proceedings herein, the undersigned will move this Court at Part 72, on the 22nd day of June 2005, at 9:30 A.M., or as soon thereafter as counsel can be heard, for an order:

Appendix E

1. Dismissing the indictment, or in the alternative, dismissing or reducing counts therein, pursuant to C.P.L. §§210.20, on the grounds that the evidence before the grand jury was not legally sufficient;

2. Dismissing the indictment, or in the alternative, dismissing or reducing counts therein, pursuant to C.P.L. §§210.20, on the grounds that the grand jury proceeding was defective within the meaning of C.P.L. §210.35. U.S. Const., Amends. VI, XIV; N.Y. Const., Art. I, Sec. VI;

3. Granting a full inspection of the grand jury minutes by the court and defense counsel. To the extent that this Court is not willing to fully dismiss the indictment based on its own inspection, the defense requests full disclosure of the grand jury minutes to the parties, or in the alternative, relevant portions thereof, including but not limited to the prosecutor's legal instructions. In the alternative, defendant requests an order retaining a sealed copy of the grand jury minutes as a court exhibit, for inclusion in the record on appeal. U.S. Const., Amends. VI, XIV; N.Y. Const., Art. I, Sec. VI; C.P.L. §210.30;

4. Suppressing the defendant's Department of Motor Vehicles records, and any testimony regarding such records, and any other tangible or testimonial fruits of the illegal seizure and

search of the defendant, including post-seizure observations of the defendant operating the vehicle, or, in the alternative, directing the holding of a *Mapp/Dunaway* hearing, pursuant to CPL. §§ 710.20(1) and 710.60.

5. Suppressing any and all statements allegedly made by defendant or, in the alternative, directing the holding of a *Huntley/Dunaway* hearing. C.P.L. § 710.20(3).

6. Suppressing any tangible or testimonial fruits of the illegal seizure and search of the defendant, or, in the alternative, directing the holding of a *Dunaway* hearing, pursuant to C.P.L. §§ 710.20(1) and 710.60;

7. Precluding the prosecution from introducing evidence of any statement or identification testimony at trial for which proper notice has not been given pursuant to C.P.L. § 710.30(3);

8. Compelling Discovery pursuant to C.P.L. 240.40;

9. Compelling a Bill of Particulars pursuant to C.P.L. 200.95(5) and C.P.L. 100.45;

10. Precluding at trial the use of the defendant's prior criminal history or prior uncharged criminal, vicious, or immoral conduct;

Appendix E

11. Reserving to defendant the right to make additional motions as necessary; and for such other relief as this Court may deem just and proper.

DATED: NEW YORK, NEW YORK
May 25, 2005

Respectfully Submitted,

STEVEN BANKS, ESQ.
The Legal Aid Society
49 Thomas Street
New York, New York 10013
Attorney for the Defendant

GERARD M. DEENIHAN, ESQ.
Of Counsel
(212) 298-5334

TO: ROBERT MORGENTHAU
District Attorney
New York County

EDWARD BUSSEY
Clerk, Supreme Court
New York County

Appendix E

SUPREME COURT OF THE
STATE OF NEW YORK

COUNTY OF NEW YORK: PART 72

IND. No. 1982 -2005

THE PEOPLE OF THE STATE Of NEW YORK

-against-

JOSE TOLENTINO,

DEFENDANT

AFFIRMATION IN SUPPORT OF MOTION

PERSONS:

GERARD M. DEENIHAN, ESQ., an attorney duly admitted to practice law in the State of New York, affirms under penalty of perjury that:

1. I am associated with STEVEN BANKS, ESQ., and am attorney of record for the defendant, JOSE TOLENTINO. I am familiar with the facts of this case and make this affirmation in support of defendant's motion herein.

2. Unless otherwise specified, all allegations made in this affirmation are made upon information and belief based upon affiant's investigation, discussions with the

Assistant District Attorney, and the papers and proceedings had prior to this motion.

3. JOSE TOLENTINO is charged with V.T.L. § 511(3)(a)(ii), Aggravated Unlicensed of a Motor Vehicle in the First Degree.

4. The defendant was arrested on January 1, 2005 and arraigned in New York City Criminal Court, New York County, Part AR3, on January 2, 2005.

5. The defendant was arraigned in New York State Supreme Court, New York County, Part 72, on May 11, 2005.

6. I have conferred with the defendant in an effort to obtain the information necessary to prepare a defense in this case. Other than the general allegations in the complaint, defense counsel and the defendant have no independent means of obtaining precise information as to the charges in this complaint.

7. All of the information requested by the defendant is necessary for the proper preparation of the trial in this case and the avoidance of any delay once trial begins. Without such information, I cannot adequately represent the defendant.

8. Such information is within the knowledge and control of the New York County District Attorney's office and/or its witnesses. The information cannot be obtained from any other source.

Appendix E

MOTION TO INSPECT THE GRAND JURY MINUTES

9. The defendant respectfully moves this Court for an inspection of the grand jury minutes pursuant to C.P.L. §210.30. To the extent that this Court is unwilling to grant in full defendant's pending applications to dismiss all counts of the indictment based upon the Court's own inspection of the minutes, the defense requests that the Court release the minutes, in their entirety, to defense counsel, so that counsel may effectively analyze whether colorable dismissal issues exist and, to the extent that they do, effectively present written and oral argument in support thereof. In the alternative defense counsel requests a partial inspection of relevant portions, including all applicable legal instructions, absent a particularized showing by the prosecution of a reason to deny inspection. U.S. Const., Amends. VI, XIV; N.Y. Const., Art. 1, Sec. VI.

10. To the extent that concerns for the privacy or safety of witnesses are presented, the defense is willing to accede to an inspection of the minutes by counsel alone, subject to any appropriate orders restricting disclosure of the minutes to the defendant personally.

11. In the alternative, and to the extent that this Court does not order full disclosure of the grand jury minutes, defendant requests an order directing that a sealed copy of the minutes, or undisclosed portions thereof, be retained as a court exhibit for inclusion in the record on appeal from any prospective judgment of

conviction. The defense is entitled as a matter of law to such an order, since it is necessary to fully effectuate defendant's right to appeal, as guaranteed by State statutory law, the Due Process Clause of the N.Y. Constitution, Article, I, Section VI, and the Equal Protection Clauses of the State and federal Constitutions.

MOTION TO DISMISS OR REDUCE COUNTS OF THE INDICTMENT BECAUSE THEY ARE NOT SUPPORTED BY LEGALLY SUFFICIENT EVIDENCE

12. The defendant moves this Court, upon the court's inspection of the grand jury minutes, as is requested, *ante*, for an order dismissing the indictment, or in the alternative, dismissing or reducing counts therein, pursuant to C.P.L. §210-20(1)(b), on the grounds that the evidence before the grand jury was not legally sufficient to establish the offenses charged or any lesser included offense.

13. Pursuant to C.P.L. 210.20(1), the defendant moves to dismiss the indictment, if upon inspection the court determines that the evidence before the grand jury was not legally sufficient to establish the commission by the defendant of the charges or of any lesser included offense. In particular:

a. As to the charge of V.T.L. § 511(3)(a)(ii), Aggravated Unlicensed Operation of a Motor Vehicle in the First Degree, the evidence was not legally sufficient to establish that:

1) Defendant was operating a motor vehicle;

2) Defendant operated a motor vehicle on a public highway;

3) At the time defendant operated a motor vehicle on a public highway, he had in effect ten or more suspensions on his driver's license;

4) Such suspensions were imposed for failure answer, appear or to pay a fine;

5) Such suspensions were imposed pursuant to V.T.L. § 226(3) or V.T.L. § 510(4 - a);

6) Such suspensions were imposed on at least ten different dates.

MOTION TO DISMISS OR REDUCE COUNTS OF THE INDICTMENT BECAUSE THE GRAND JURY PROCEEDING WAS PROCEDURALLY DEFECTIVE

14. The defendant moves this Court, upon the court's inspection of the grand jury minutes, as is requested, *ante*, for an order dismissing the indictment, or in the alternative, dismissing or reducing counts therein, pursuant to C.P.L. §210.20(1)(c), on the ground that the grand jury proceeding was defective within the meaning of C.P.L. §210.35 (C.P.L. §210.20(1)(c)) because:

a. the grand jury was illegally constituted (C.P.L. §210.35 (1));

b. the proceeding was conducted before fewer than sixteen grand jurors (C.P.L. §210.35(1));

c. fewer than twelve grand jurors concurred in the finding of the indictment; (C.P.L. §210.35(3)); and

d. the proceeding otherwise failed to conform to the requirements of Criminal Procedure Law, Section 190, other applicable State law, and the State and federal constitutions to such degree that the integrity thereof was impaired, and prejudice to defendant might have resulted (C.P.L. §210.35(5)); defaults in the conformity of the proceedings include but are not limited to:

   i. the violation by the prosecutor of the applicable constitutional, statutory, and common-law rules of evidence, including the applicable rules against hearsay (*see* (C.P.L. §190. 30);

   ii. the presentation of deficient or erroneous instructions on the law and the weight of the evidence to the grand jury, including but not limited to the incorporating by reference of instructions given to this grand jury regarding the same crime in the course of an earlier presentation. *People v. Brown*, 81 N.Y.2d 798 (1993); C.P.L. §190.25(6).

iii. the failure of the prosecutor to present exculpatory evidence that the People knew or should have known existed;

iv. the presentation of improper and extraneous material to the grand jury;

v. the utilization by the prosecutor of the grand jury as a discovery device to prepare for trial; and

vi. the improper cross-examination of the defendant and/or other defense witnesses by the prosecutor.

MOTION TO SUPPRESS PHYSICAL EVIDENCE

15. Defendant has not been provided with police reports or other *Rosario* material that may be necessary to support suppression of physical evidence; the defendant should therefore not be denied a suppression hearing on the grounds that the defendant is unable to give precise factual arguments in support of this motion. *People v. Mendoza*, 82 N.Y.2d 415 (1993); *see also People v. Landy*, 59 N.Y.2d 369, 374; *People v. Gruden*, 42 N.Y. 2d at 218.

16. Nonetheless, given the limited information thus provided to defense counsel (the complaint and the Department of Motor Vehicles abstract), there are no factual allegations indicating that why defendant was stopped. Defendant was operating the motor vehicle in

accordance with all posted traffic laws. Defendant was simply driving the car on a public road and denies committing any traffic infraction that would have given the police cause to stop his vehicle.

17. Defendant's vehicle was stopped without reasonable suspicion, probable cause, or any other legal justification, therefore, violating his Constitutional rights under the Fourth, Fifth and Fourteenth Amendments to the United States Constitution and Article I, §§ 6 and 12 of the New York State Constitution. Any evidence thus seized from the defendant as a result of this illegal seizure is therefore subject to suppression as **fruits of his illegal seizure and search.** *Mapp*, 367 U.S. at 655 ("**All evidence** obtained by searches and seizures in violation of the constitution is, by the same authority, inadmissible in a state court."); *Dunaway v. New York*, 422 U.S. 200 (1979); *Terry v. Ohio*, 392 U.S. 1 (1968); *People v. DeBour*, 40 N.Y.2d 210 (1976); *Wong Sun v. United States*, 371 U.S. 471 (1963); *People v. DeBour*, 40 N.Y.2d 210 (1976); *Aguilar v. Texas*, 378 U.S. 108 (1964); *Spinelli v. United States*, 393 U.S. 410 (1969); *People v. Bigelow*, 66 N.Y.2d 417 (1985); *See People v. Rossi*, 80 N.Y.2d 952 (1992).

18. Defendant, therefore, moves to suppress the evidence obtained in this case, to wit, his Department of Motor Vehicle ("DMV") records, and any testimony regarding such records as well as any tangible or testimonial **fruits of his illegal seizure and search** by police, including observations of the defendant by police,

on the ground that he was seized and searched in violation of his rights under the Fourth, Fifth and Fourteenth Amendments to the United States Constitution and Article I, §§ 6 and 12 of the New York State Constitution.

DEFENDANT DOES HAVE STANDING TO MOVE FOR SUPPRESSION OF ALL EVIDENCE OBTAINED

19. **All occupants of a car stopped by the police have standing to contest the illegality of the stop.** *People v. Millan*, 69 N.Y.2d 514 (1987), *People v. May*, 81 N.Y.2d 716 (1992). Here, the car and the defendant were seized when the police stopped the car. Thus, defendant has standing to seek suppression of his DMV records as the fruit of his unlawful seizure. *See People v. George Azpuru*, Decision and Order, Docket No. 2003NY002384 (Crim. Ct. N.Y. Co. 8/26/02) (Harris, J.); *People v. Santiago*, 168 Misc.2d 883 (Crim. Ct., N.Y. Co. 1996) (Stolz, J.); *People v. Rizuan*, 165 Misc.2d 985 (Crim. Ct., N.Y. Co. 1995) (Mickens, J.); *People v. Thomas*, 164 Misc.2d 721 (Crim. Ct., N.Y. Co. 1995) (Cataldo, J.); *People v. Rossi*, 80 N.Y.2d 952 (1992).

DMV RECORDS ARE SUPPRESSIBLE AS FRUITS OF FOURTH AMENDMENT VIOLATIONS

20. As a direct result of the defendant's unlawful seizure by the police, described above, the police and

the prosecution obtained his DMV records. As stated in the complaint, the police officer conducted a computer check of the defendant's DMV records "which revealed that defendant's license was suspended and has not been reinstated." Subsequently, a Department of Motor Vehicles Abstract of Driving Record of the defendant was obtained by the prosecution from the Department of Motor Vehicles and filed with the Court and served on the defense. **But for defendant's unlawful seizure by the police, his DMV records would not have been obtained in this case, and they are therefore the fruit of the police illegality. The steps required to obtain a DMV records check are the stop of the vehicle and the elicitation of the driver's name or the driver's license number. Without this basic information, which identifies the driver, a DMV check cannot be run by the police officer.** Thus, the information obtained from the DMV check is inextricable from the stop of the vehicle. As the court in *Azpuru* recently explained,

> [B]ut for the stop, the **critical link** between the defendant's identity, his operation of the vehicle and his unlicensed status might not have been learned by the arresting officer. Thus, if the stop was unlawful, and the police had no untainted basis for determining defendant's unlicensed status, evidence of that status should be suppressed.

21. The *Azpuru* decision builds on a line of cases standing for the proposition that DMV records are

suppressible pursuant to the exclusionary rule and the "fruit of the poisonous tree" doctrine. *See, e.g., People v. Santiago*, 168 Misc.2d 883 (Crim. Ct., N.Y. Co. 1996) (Stolz, J.); *People v. Rizwan*, 165 Misc.2d 985 (Crim. Ct., N.Y. Co. 1995) (Mickens, J.); *People v. Thomas*, 164 Misc.2d 721 (Crim. Ct., N.Y. Co. 1995) (Cataldo, J.).

22. This is a subset of the more general and well-established proposition, adhered to by the Court of Appeals, that the exclusionary rule is not limited to tangible evidence, evidence of defendant's statements, or testimony of prior identifications of the defendant; rather, it is broadly applicable to intangible fruits of illegal police conduct. *See People v. Gethers*, 86 N.Y.2d 159 (1995) (holding that undercover officer's confirmatory identification of a defendant is subject to suppression if it is the product of an illegal arrest), *People v. Rossi*, 80 N.Y.2d (1992) (reversing the denial of defendant's suppression motion requesting a *Dunaway* hearing, and holding that testimony by a police officer about his **observations** of defendant's post-arrest conduct was suppressible as fruit of the wrongful arrest); *Wong Sun v. United States*, 371 U.S. 471, 485-86 (1963) (finding no "**logical distinction between physical and verbal evidence [,]**" and holding that "**testimony as to matters observed** during an unlawful invasion" is suppressible under the exclusionary rule); *see also Davis v. Mississippi*, 394 U.S. 721 (1969) (holding that evidence of defendant's fingerprints was suppressible under the exclusionary rule); *People v. May*, 81 N.Y.2d 725 (1992) (holding that the illegal

seizure of defendant in a stolen vehicle warranted suppression of police photographs of the vehicle); *People v. Dory*, 59 N.Y.2d 121, 126-27 (1983) (noting that "testimony . . . concerning physical evidence observed or seized . . . or incriminating actions observed and not attenuated" would be inadmissible as fruits of illegal police conduct); *People v. Ortega*, 241 A.D.2d 369 (1st Dept. 1997) (holding that because defendant's arrest was illegal, the suppression order extended to an officer's observations of the defendant following the arrest, including testimony as to what the defendant was wearing); *People v. Young*, 202 A.D.2d 1024 (1994) (holding that where an arrest was not supported by probable cause, police observations made at the point of and following the arrest must be suppressed); *People v. Akwa*, 151 Misc.2d 106 (Sup. Ct., King's Co. 1991) (holding that **police testimony as to "the identities of the defendants based upon observations and inquiries that flowed directly from the stop** of th[e] car [later discovered to have been stolen] and the seizure of its occupants" was suppressible as the fruit of the unlawful seizure); *People v. Ali*, Docket No. 98N066096, Decision and Order, May 5, 1999 (Mondo, J.) (granting a "*Dunaway*" hearing because "defendant is entitled to suppression of any observations the police were able to make based on an unlawful search or seizure").

23. Thus, the exclusionary rule is clearly "not limited to the suppression of physical tangible evidence." *Santiago*, 168 Misc.2d at 886. The discovery of the defendant's DMV records was made by the exploitation

of his illegal seizure, and as such constitutes suppressible fruit of the poisonous tree. Although a defendant's body or identity cannot be suppressed as the fruit of an unlawful stop or arrest (*see INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984); *United States v. Crews*, 445 U.S. 463 (1980)), **DMV records are *not* "merely an extension of the defendant's identity."** *Santiago*, 168 Misc.2d at 886. Just as testimony as to the identification of the defendant is suppressible if the identification was the result of the illegal seizure of the defendant (*see People v. Gethers*, 86 N.Y.2d 159 (1995)), so testimony as to the defendant's DMV records -- and the records themselves -- are suppressible, if "**but for [the stop of the defendant] . . . the defendant's DMV records would not have come to light.**" *Thomas*, 164 Misc.2d at 725; *see also Santiago*, 168 Misc.2d at 886; *Rizwan*, 165 Misc.2d at 987.

24. **The Department of Motor Vehicles records, while public records, remain the product of an illegal seizure**. Although the DMV records which form the basis for this prosecution were in existence in computerized form prior to the defendant's arrest, law enforcement obtained these records as a direct result of the defendant's **illegal street stop** and subsequent arrest. If the defendant had not been stopped, detained and arrested unlawfully, the District Attorney would not have obtained the records which the prosecution will seek to introduce at trial.

25. **As this court is aware, a DMV check cannot be run simply from observing the license plate of a**

car driving down the road. The steps required to obtain a DMV records check are the stop of the vehicle and the elicitation of the driver's name or the driver's license number. Without this basic information, which identifies the driver, a DMV check cannot be run by the police officer. Thus, the information obtained from the DMV check is inextricable from the stop of the vehicle. In this case, had it not been for the illegal stop, the police officer would not have been able to run a DMV check. Thus, there is a **direct connection** between the stop, the driver, the taking of the license, and the DMV abstract. Testimony elicited to obtain the identification of the defendant is also suppressible as fruit of the poisonous tree, if the identification was the result of the illegal stop and seizure of the defendant. *See People v. Gethers*, 86 N.Y.2d 159 (1995).

26. In the instant case, it is not the privacy interest of the DMV records that is at issue, it is the defendant's standing **to contest the stop of the car** and the suppression **any fruits of the illegal seizure**. Furthermore, inasmuch as defendant had not committed a traffic infraction, he had a reasonable expectation of privacy in his DMV records under the Federal Driver's Privacy Protection Act, 18 U.S.C. Sec 2721. *See People v. Moya*, 192 Misc.2d 670, 672, 748 N.Y.S.2d 648. **The federal act allows disclosure of motor vehicle records only to lawful functions** of a governmental agency. *Id.* at 677. Thus where the police illegally seize the defendant and obtain information from that seizure, the

defendant has a privacy right in his motor vehicle records.

27. Although the Appellate Term Second Department held in *People v. Sajous*, that a motorist lacked standing to move to suppress a DMV abstract, "because there was no reasonable expectation of privacy in DMV files," the court's decision did not fully address the issue in front of this court. 180 Misc.2d 693, 695 N.Y.S.2d 471. The Court in *Sajous* held that the defendant was "required to establish that he had a legitimate expectation of privacy **in the search of the DMV files** and that his expectation of privacy was reasonable under the circumstances." *Id.* **However**, the *Sajous* case does not discuss suppression of observations obtained due to an illegal stop, the issue currently before this court.

28. Additionally, this Court is not bound by the findings of the Second Department's decision in *People v. Sajous*. It does not address the issue in question, which is the legality of the stop and thus the fruits of that seizure of the defendant. 180 Misc.2d 693, 695 N.Y.S.2d 471. Furthermore, there is a split in New York law on this issue and case law from concurrent jurisdictions, which are **on point**, have held that a suppression hearing should be granted to determine whether the stop by the police was legal. *See Moya*, 748 N.Y.S.2d at 650; *Azpuru*, 2003NY002384 (Crim. Ct. N.Y. Co. 8/26/02; *People v. Santiago*, 168 Misc.2d 883 (Crim. Ct., N.Y. Co. 1996) (Stolz, J.); *People v. Rizwan*, 165 Misc.2d 985 (Crim. Ct., N.Y. Co. 1995) (Mickens, J.);

People v. Thomas, 164 Misc.2d 721 (Crim. Ct., N.Y. Co. 1995) (Cataldo, J.); *People v. Rossi*, 80 N.Y.2d 952 (1992); *People v. Velit*, No. 2001QN027671, (N.Y. Crim. Ct. Queens County 2002). Whether any evidence obtained from the stop is fruit from the poisoness tree is an issue which should be resolved by the findings of the hearing court.

DEFENDANT WAS SEIZED ILLEGALLY

29. To seize a car, even temporarily, the police need a reasonable suspicion that its occupants have been, are, or are about to commit a crime or a traffic violation. *Delaware v. Prouse*, 440 U.S. 648 (1979), *People v. Ingle*, 36 N.Y.2d 413 (1975). Here, the car and the defendant were seized when the police stopped the car. **On the day of the defendant's warrantless seizure and arrest by the police and on the day of the alleged incident, he had not been engaged in any unlawful or suspicious conduct. He had not been driving in an erratic, dangerous or otherwise unlawful manner, nor was there anything illegal about the condition of his automobile. Additionally, defendant was not playing his radio at an unlawfully high volume.** Moreover, any contrary information was not communicated to the police by a reliable source with personal knowledge. The defendant specifically challenges the reliability and basis of knowledge of any informant who may have transmitted information to the police. Therefore, his warrantless seizure by the police was unjustified and, consequently, unconstitutional, in that it was not based on reasonable suspicion or probable cause.

30. In the instant case, there is clearly a direct, causal relationship between the illegal stop of the defendant's vehicle and the discovery of the defendant's record of suspensions. The **People have alleged that the defendant was stopped while driving a car, effecting a seizure for the purposes of the Fourth Amendment**. The police officer then ordered the defendant to turn over her license to the officer. From that information, the officer came to the conclusion that the defendant had outstanding suspensions of his license. The **illegal stop of the defendant led directly to the discovery of the defendant's driving records**.

31. More importantly, once a police officer has stopped a car and thus seized an individual, the burden lies with the prosecution, to show that the stop of the occupant's car was based on reasonable suspicion that a crime has been, is, or is about to be committed and it was the defendant who had committed the crime. *See Delaware v. Prouse*, 440 U.S. 648 (1979). Prior to the seizure of defendant, there are no allegations of any illegal activity. It is only after the DMV check was run, that there is any allegation of illegal conduct by defendant. Thus, without the illegal conduct by the police, there would have been no discovery of the DMV abstract.

MOTION TO SUPPRESS STATEMENTS

32. During defendant's arraignment in Criminal Court, the prosecution served notice that it intended to introduce a statement against the defendant at trial.

33. The defendant moves to suppress this statement pursuant to the Fourth, Fifth, and Fourteenth Amendments to the United States Constitution, Article 1 § 6 of the Constitution of the State of New York, and C.P.L. §§60.45 and 710.20 and contends that it was illegally obtained on the following grounds:

A. It was the tainted fruit of an illegal arrest in that the defendant was arrested without probable causes. See above, at paragraphs 29-31.

B. It was made after the defendant was subjected to custodial interrogation without first being advised of his constitutional rights. *Miranda v. Arizona*, 384 U.S. 435 (1966).

C. The defendant made this statement without knowingly and voluntarily waiving those rights.

D. The statement was involuntary. C.P.L. §60.45.

E. The statement was secured in violation of the defendant's right to counsel.

34. Therefore, all statements made by the defendant must be suppressed, or a hearing granted to litigate the issues. *People v. Huntley*, 15 N.Y.2d 72, 255 N.Y.S.2d 838, 204 N.E.2d 179 (1965).

35. Furthermore, defendant moves to suppress any unnoticed statements for impeachment purposes, or in

the alternative, defendant requests a pre-trial hearing to determine the voluntariness of any such statement pursuant to C.P.L. §§ 60.45 and 710.40. *See also People v. Clemons*, 166 A.D.2d 363 (1st Dept. 1990); *People v. Grillo*, 176 A.D.2d 583.

Any Statements Elicited From The Defendant Were Involuntarily Made And In Violation Of Miranda

36. The defendant asserts that any statements made by him were involuntary, in that they were elicited by coercion and the force of police authority. In addition, any such statements were obtained by means of police interrogation while the defendant was in police custody, prior to a proper advisement of his constitutional rights pursuant to *Miranda v. Arizona*, 384 U.S. 435 (1966). The defendant is not required to make any other specific factual allegations as to the involuntariness of these statements. *See* C.P.L. §§ 710.20(3) and 710.60(3)(b).

MOTION TO PRECLUDE THE OFFERING OF EVIDENCE

37. The prosecution is required to give the defendant notice of intent to offer evidence of statements or identification testimony within 15 days of arraignment, pursuant to CPL. § 710.30.

38. The defendant has not received notice of the prosecution's intention to offer either statement or identification testimony during the prescribed period.

No good cause exists for this failure to provide the required notice.

39. The defendant therefore requests that any testimony concerning statements or identification for which proper notice has not been given be precluded, pursuant to CPL. § 710.30(3). *See also People v. O'Doherty*, 70 N.Y.2d 479 (1987); *People v. Baughton*, 70 N.Y.2d 854 (1987).

MOTION FOR A VOLUNTARINESS HEARING

40. The defendant seeks preclusion of any other unnoticed statements, if they exist, so the Court may determine their voluntariness. C.P.L. § 60.45. The prosecution may not intend to use any such statements in their direct case; however, the defendant needs notice of any statements which my be used to impeach his on cross examination in the event that the defendant intends to testify on his own behalf. Notice of these statements is imperative as it will assist the defendant in choosing whether or not to testify in this litigation. *People v. Utley*, 353 N.Y.S.2d 301, 313 (N.Y.Co. 1974) ("[t]he public policy of this state abhors the use of incriminating statements without first giving sufficient notice to the defendant and granting him an opportunity to investigate and plan his defense accordingly").

41. The defendant further asserts that these statements, if they exist, were involuntary, as they were directed by coercion and the force of the police authority.

The defendant is not required to make any other specific factual allegations as to the involuntariness of his statements. CPL 710.20(3); 710.60(3) (b).

42. For the reasons above, the defendant requests that all statements sought to be introduced as evidence be precluded and, in the alternative, that a hearing be ordered for the purpose of determining the propriety of the defendant's request that his statements be precluded.

SANDOVAL MOTION

43. The defendant moves to preclude the prosecutor from using at trial evidence of any and all of defendant's prior criminal convictions, any and all underlying bad acts, and any and all prior uncharged criminal, vicious, or immoral conduct. With respect to uncharged conduct, the defendant alternatively demands that the prosecution supply her with all specific instances of prior uncharged conduct that they will seek to offer on their direct case against the defendant, so that a timely hearing may be held as to the admissibility of such uncharged conduct. *See People v. Ventimiglia*, 52 N.Y.2d 350, 362 (1981).

44. The defendant intends to testify in this matter. Therefore, the defendant moves to preclude the District Attorney from cross-examining the defendant at trial on any of the defendant's prior arrests or any uncharged criminal, vicious, or immoral conduct that the

prosecution may be aware of. *See People v. Sandoval*, 34 N.Y.2d 371 (1974); CPL. § 240.43.

45. The defendant's prior arrests and bad acts should be suppressed because their use on cross-examination would have no purpose other than to show that defendant has a propensity to commit crimes and, therefore, is likely to have committed the crimes charged in the accusatory instrument. *See People v. Schwartzman*, 24 N.Y.2d 241 (1969); *People v. Shields*, 58 A.D.2d 94 (1977), *aff'd*, 46 N.Y.2d 764 (1978).

NOTICE OF DEMAND FOR PRESERVATION AND PRODUCTION OF ALL RADIO OR OTHER RECORDED POLICE COMMUNICATION

46. The defendant wishes to put the prosecution on notice that he is requesting the production of all recorded police communications related to this case, included, but not limited to the 911 tape, any radio runs or Sprint records and any communications between the police officers. The defendant is therefore putting the prosecution on notice that they must obtain this material from the police department and prevent its destruction before it is produced.

47. The defendant wishes to put the prosecution on notice that he is hereby challenging the reliability of any transmitted information the officers in this case may have relied upon.

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NOTICE OF DEMAND FOR PRESERVATION OF ALL EVIDENCE

48. The defendant wishes to put the prosecution on notice that he is requesting the preservation of all evidence related to this matter. The defendant is therefore putting the prosecution on notice that they must obtain this material from the police department and prevent its destruction before it is produced.

MOTION TO COMPEL A BILL OF PARTICULARS

49. Attached to and made a part of this Motion is Exhibit A, the defendant's Request for a Bill of Particulars made pursuant to CPL. §§ 200.95(5) and 100.45.

50. Should the prosecution fail, without justification or good cause, to comply, in whole or in part, to the Request for a Bill of Particulars, defendant moves in advance for an order compelling disclosure of the information requested. *See* C.P.L. §§200.95 and 100.45.

51. I have conferred with the defendant in an effort to obtain information necessary for the preparation of the defense in this case. The accusatory instrument contains none of the particulars requested and does not contain the specificity required for the defendant to be informed of the exact nature of the charges against him. Defense counsel and defendant have no independent means of obtaining precise information as to the charges

in this case, other than the general allegations of the complaint. All of the information requested by the defendant is necessary for the proper preparation of the trial defense in this case and for the avoidance of delay once trial begins. Without such information, defense counsel cannot adequately represent the defendant. Such information is within the knowledge and control of the District Attorney of New York County, and/or its witnesses. The information cannot be obtained from any other source.

52. None of the requested particulars are evidentiary in nature, nor will they reveal how the prosecution intends to prove the alleged facts.

53. Defendant is requesting only that the District Attorney reveal what facts the prosecution intends to sustain at trial on the accusatory instrument. The accusatory instrument does not adequately inform defense counsel of the factual basis underlying the conclusory allegations of the crimes charged. The Court of Appeals has ruled that a defendant is entitled to be informed of the specific facts underlying each element of the crimes charged. *People v. Iannone*, 45 N.Y.2d 589, 412 N.Y.S.2d 110 (1978).

54. Consequently, the defense requests that this court order the prosecution to reveal the factual information requested in the attached Bill of Particulars.

Appendix E

MOTION TO COMPEL DISCOVERY

55. Attached hereto and made a part hereof, as Exhibit B, is the defendant's Demand to Produce made pursuant to CPL. §240.20.

56. Should the prosecution, within 15 days of the filing of the Demand to produce, fail to respond in writing or, without justification or good cause, does not comply or only complies in part with defendant's demand to produce, defendant moves in advance for an order compelling disclosure of the information requested. *See* C.P.L. §§ 240.35, 240.40(1) (a), and 240.70.

57. All of the information requested in the Demand to Produce is material and essential to the adequate preparation of a defense and to avoid unnecessary delay at trial. The information is within the knowledge and control of the District Attorney's office and/or its witnesses, the production of these materials would not place an unreasonable burden on the District Attorney's office. Most importantly, the defense cannot obtain the requested information or property through any other means.

58. The prosecution may argue that the Voluntary Disclosure Form (VDF) provides all the pre-trial discovery to which the defendant is entitled. That interpretation too narrowly construes the discovery statute and provides the prosecution with an unsound and unfair tactical advantage. The Court of Appeals has

held that broader pretrial discovery enables the defendant to make a more informed plea decision, minimizes tactical and often unfair advantages to one side, and increases to some degree, the opportunity for the accurate determination of guilt or innocence. *People v. Copicotto*, 50 N.Y.2d 222 (1980). Furthermore, justice is best served, and the rights of the defendant best protected within the framework of statutory and decisional law. *People v. DiMatteo*, 80 Misc.2d 1029 (Sup. Ct. Richmond Co. 1975). Disclosure should not be denied solely to give the prosecution a tactical advantage or to lay the basis for trial by ambush. *Id.* at 1031 (citing *People v. Utley*, 77 Misc.2d 86, *People v. Blair*, 64 Misc.2d 519, 521). The truth is best served by a decent opportunity to prepare in advance of trial. Therefore, the defense asks that the court grant the defendant's discovery requests beyond the scope of the prosecution's VDF.

PRECLUSION AS RELIEF FOR FAILURE TO COMPLY WITH DISCOVERY DEMANDS AND THE REQUEST FOR A BILL OF PARTICULARS

59. Should the prosecution fail to timely serve written refusal to comply with the Demand to Produce and Request for a Bill of Particulars setting forth the grounds for its refusal, or if this Court is satisfied that the prosecution has not shown good cause or justification for such refusal, the court must order the prosecution's compliance with defendant's request. *See* C.P.L. §§200.95(5) and 240.40(1).

60. In the event the prosecution fails to comply with a court ordered Demand to Produce and/or the Request for a Bill of Particulars, the defense moves in advance for an order precluding the District Attorney from calling any witness or introducing any evidence related to the information sought in the Demand to Produce and/or Request for a Bill of Particulars. *See* C.P.L. §§200.95(5) and 240.70(1).

61. In the alternative, the court should order the prosecution to make available for inspection, photographing, copying and/or testing, within ten days of the oral order of the court, any and all items and/or property encompassed by the defendant's Demand to Produce and/or Request for a Bill of Particulars.

RESERVATION OF RIGHTS

62. The defendant respectfully requests the right to make any and all further motions as may be necessary based upon information and disclosures that may result from the granting of requests made in this motion. *See People v. Frigenti*, 91 Misc.2d 139 (N.Y. Sup. 1977); CPL. § 255.20(3). The defendant also reserves the right to request an adjournment after pre-trial hearings and to investigate information developed at such hearings pursuant to *People v. Peacock*, 31 N.Y.2d 907 (1972).

63. The defendant reserves the right to be prosecuted only pursuant to a legally sufficient misdemeanor information. The defendant does not waive

that right by filing this motion. *See People v. Weinberg*, 34 N.Y.2d 429 (1974).

64. The defendant does not consent to any delay of his right to a speedy trial in this matter except where such consent is expressly given by him.

WHEREFORE, the affiant respectfully requests this Court to grant the relief sought herein and reserve to defendant the right to amend or supplement this motion for such other and further relief as this Court may deem just and proper.

DATED: NEW YORK, NEW YORK
May 25, 2005

/s/
GERARD M. DEENIHAN, ESQ.

To: ROBERT MORGENTHAU
District Attorney
New York County

EDWARD BUSSEY
Clerk, Supreme Court
New York County

ATTACHMENTS: Exhibits A and B.

Appendix E

EXHIBIT A

SUPREME COURT OF THE
STATE OF NEW YORK

COUNTY OF NEW YORK, PART 72

IND. NO.: 1982 – 2005

THE PEOPLE OF THE STATE OF NEW YORK

-against-

JOSE TOLENTINO,

Defendant.

PERSONS:

REQUEST FOR A BILL OF PARTICULARS

In order for the defendant to properly defend against the charges in the accusatory instrument, it is essential that defense counsel be supplied with specific items of factual information not recited in the accusatory instrument, including the substance of the defendant's conduct. This is necessary because the accusatory instrument is both factually vague and conclusory in nature, and because no preliminary hearing was held.

Pursuant to C.P.L. §§ 100.45 and 200.95, a Request for a Bill of Particulars is herewith made demanding the following particulars:

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1. With respect to each and every count of the accusatory instrument, state whether:

   a. The prosecution intends to prove that defendant acted as principal, or as accomplice, or as both.

   b. If the prosecution intends to prove that defendant acted as an accomplice, then set forth separately the conduct:

      i. Of defendant that constitutes the basis of defendant's accessorial liability; and

      ii. Of each other participant that constitutes the basis of that participant's accessorial liability.

2. State the names, addresses, and birth dates of any persons with whom defendant is alleged to have acted in concert, whether such persons were arrested, and, if arrested, the docket numbers of their cases.

3. State the exact date and time of each alleged incident, and, if more than one incident is alleged, state their sequence.

4. State the exact location of each alleged incident, including any and all identifying landmarks.

5. With respect to the charge of V.T.L. 511(3) (a) (ii), Aggravated Unlicensed Operation of a Motor Vehicle in the First Degree, state the following:

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a. The exact times at which the defendant is alleged to have operated the vehicle in violation of the statute under which he is charged.

b. The exact manner in which the defendant is alleged to have operated the vehicle, including, but not limited to, whether he was driving the vehicle or sitting in the vehicle.

c. Exactly where the defendant is alleged to have operated the vehicle.

d. Who is alleged to be the owner of the vehicle that the defendant was allegedly driving, and how such ownership is known to the prosecution.

e. Whether anyone else is alleged to have been in the vehicle with the defendant at the time of his arrest, and, if so, the name and address of such person.

f. The exact date, time and nature of the suspension or suspensions that are alleged to be the basis for the charge, including, but not limited to, the cause for the issuance of any tickets or summonses, the manner in which, the date and time at which, and by whom (including the name, shield number and precinct of any police officer or officers) any such tickets or summonses were delivered to the defendant, if at all.

g. Exactly how and by whom the suspension or suspensions were made known to the defendant, if at all.

6. With respect to the arrest of defendant, state the following:

a. The exact time at which defendant was first observed by police officers on the date of the alleged offense;

b. The exact location of the police officer(s) who first observed defendant, including any and all identifying landmarks;

c. The exact time and location at which defendant was first detained and/or taken into custody by police officers;

d. The reason that the police detained defendant and/or took defendant into custody;

e. The exact time and location, including any and all identifying landmarks, at which defendant was formally placed under arrest;

f. Whether there was probable cause to arrest defendant and the basis of any such probable cause, including, but not limited to, whether the arresting officer had first-hand knowledge of the commission of the alleged crime.

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Request is further made that any refusal to supply any of the requested material be made in writing, setting forth the grounds for such refusal, and that a copy of such writing be served upon the undersigned and filed with the Court within 15 days of receipt by you of this Request for a Bill of Particulars. *See* C.P.L. § 200.95(4).

DATED: NEW YORK, NEW YORK
May 25, 2005

RESPECTFULLY SUBMITTED,

STEVEN BANKS, ESQ.
The Legal Aid Society
49 Thomas Street
New York, NY 10013
Attorney for the Defendant

GERARD M. DEENIHAN, ESQ.
Of Counsel
(212) 298-5334

TO: ROBERT MORGENTHAU
District Attorney
New York County

EDWARD BUSSEY
Clerk, Supreme Court
New York County

Appendix E

EXHIBIT B

SUPREME COURT OF THE
STATE OF NEW YORK

COUNTY OF NEW YORK: PART 72

IND. NO.: 1982 - 2005

THE PEOPLE OF THE STATE OF NEW YORK

-against-

JOSE TOLENTINO,

Defendant.

PERSONS:

DEMAND TO PRODUCE

Pursuant to C.P.L. § 240.20 defendant demands that you produce for inspection, photographing, copying or testing, the following items:

1. Any written, recorded or oral statements of the defendant, or of any alleged co-defendant, made, other than in the course of the criminal transaction, to a public servant engaged in law enforcement activity or to a person then acting under such public servant's direction or in cooperation with him or her,

regardless of whether the prosecution intends to offer such statement at trial and regardless of whether such statement was made under a promise of full or partial immunity.

2. Any written report or document, or portion thereof, concerning a physical or mental examination, or scientific test or experiment, relating to the criminal action or proceeding which was made by, or at the request or direction of, a public servant engaged in law enforcement activity, or which was made by a person whom the prosecution intends to call as a witness at trial, or which the prosecution intends to introduce at trial, *including any and all reports of medical treatment received by the complaining witness(es).*

3. Any photograph or drawing relating to the criminal action or proceeding which was made or completed by a public servant engaged in law enforcement activity, or which was made by a person whom the prosecution intends to call as a witness at trial, or which the prosecution intends to introduce at trial.

4. Any other property obtained from the defendant, or a co-defendant to be tried jointly.

5. Any audiotapes, videotapes, or other electronic recordings including 911 tapes which the prosecutor intends to introduce at trial, irrespective of whether such recording was made during the course of the criminal transaction.

6. The approximate date, time, place and circumstances of each charged offense and of defendant's arrest, including, but not limited to, the information requested in Request for a Bill of Particulars above.

7. Any statement allegedly made by the defendant or co-defendant concerning the alleged criminal incident, prior to, during or subsequent to the alleged criminal incident, whether exculpatory or inculpatory, to any person, other than as described in C.P.L. § 240.20(1) (a), and the name and address of any such person.

8. If any statements exist under paragraph 7 above, whether *Miranda* warnings were given to the defendant or co-defendant, as the case may be, and, if so, by whom, when, where, and in what manner.

9. The exact time(s) and date(s) when, and manner in which, and by whom, the police were apprised of the alleged crimes, including, but not limited to, any complaint made to the police, 911 call, walk in, "Crime Stoppers" call, or tip, and including the name and address of any and all such persons giving such information.

10. Whether an informant was used in this case, and, if so, the informant's name and address, whether the informant has received or expects to receive any payment for his or her services, whether such informant is a confidential informant with a

registered I.D. Number, specifying such I.D. Number, whether such informant has given information in the past, specifying such information and to whom such information was given on each occasion, and the exact information received from such informant in the instant case, specifying when, by whom, and the manner in which it was received.

11. The names, shield numbers, and assignments of any and all police officers and/or law enforcement personnel present at the time and place of the defendant's detention and formal arrest. *See People v. Wanda Harris*, N.Y.L.J., January 2, 1992, p. 22, col. 3 (Crim. Ct. N.Y. Co.) (Kluger, J.).

12. Whether the arresting officer or any other law enforcement official had the defendant or co-defendant under observation prior to the arrest, and, if so, for how long a period of time, the reason for such observation, and the name and shield number of any such officer or official.

13. Any and all police department reports, memoranda, or records prepared in connection with the investigation of the crime charged, and the arrest of the defendant, including, but not limited to, those made by the New York City Police Department.

14. A list of the names, addresses and birth dates of any and all prospective prosecution witnesses, prior to trial. *See People v. Rivera*, 119 A.D.2d 517, 501 N.Y.S.2d 38 (1st Dept. 1986); *People v. Arthur*, 175

Misc.2d 742, 673 N.Y.S.2d 486 (Sup. Ct., N.Y. Co. 1997); *People v. Arrellano*, 150 Misc.2d 574, 569 N.Y.S.2d 574 (Crim. Ct., N.Y. Co. 1991).

15. Whether any person identified; *or failed to identify*, the defendant or co-defendant, or identified another as the perpetrator of the alleged crimes, and the exact time, date, place and manner of any such identification or non-identification, including, but not limited to, a single photograph, a photographic array, a show-up, or a line-up, and the name and address of any such person, whether or not the prosecution intends to call that person as a witness at trial.

16. Whether any search was conducted of the defendant or co-defendant or any property or automobile in connection with this case, and, if so, the exact date, time, place and manner of any and all such searches, the basis for such search, including, but not limited to, a warrant, reasonable suspicion, probable cause, or exigent circumstances, a complete list of all items seized during any such search, and the names, addresses and birth dates of any and all persons present at any such searches.

17. Any and all specific instances of the defendant's prior charged or uncharged criminal, vicious, or immoral conduct of which the prosecution has knowledge and which the prosecution intends to use at trial.

18. A written list of the names, addresses and qualifications of any and all experts the prosecution intends to call as witnesses at trial, together with all reports prepared by such experts or, if reports have not been prepared, a brief description of the opinion and subject matter of the opinion to which each will testify.

19. Anything required to be disclosed, prior to trial, to the defendant by "the prosecution, pursuant to the Constitution of this state or of the United States, including, but not limited to, the following:

    a. Pursuant to *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) and *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.E.2d 104 (1972), all evidence or information in the prosecution's possession, custody or control that may tend to exculpate the defendant or impeach any person whom the prosecution intends to call as a witness at any pre-trial hearing or at trial (hereinafter "prospective prosecution witness"), including, but not limited to, the following:

        1) All records and information revealing prior convictions or guilty verdicts or juvenile adjudications, including, but not limited to, relevant "rap sheets," of any prospective prosecution witness;

        2) Whether any prospective prosecution witness has been incarcerated in a federal,

state or local correctional facility, and, if so, the prison records of such witness;

3) A complete statement of any and all criminal cases currently known by the prosecution to be pending against any prospective prosecution witness, regardless of whether such cases are the subject of promise, regard or inducement, including their NYSID number(s), pursuant to *People v. Torres*, 201 A.D.2d 294, 607 N.Y.S.2d 303 (1st Dept 1994); *People v. Santiago*, 138 A.D.2d 327, 526 N.Y.S.2d 456 (1st Dept 1988);

4) A complete statement of any and all regulatory, licensing or other governmental or quasi-governmental proceedings now pending, closed, discontinued, settled or completed against any prospective prosecution witness;

5) A complete statement of any and all criminal conduct of which the prosecution has knowledge that has been committed by any prospective prosecution witness concerning which there has been no conviction, regardless of whether these crimes are the subject of a promise, reward or inducement, and regardless of whether these crimes are the subject of a pending criminal charge;

Appendix E

6) A complete statement of any consideration or promises of consideration given or offered during the course of the investigation and preparation of this action by any law enforcement officials, including prosecutors, police or informers, to any prospective prosecution witness, or to anyone assisting in the investigation leading up to the instant action, or any such consideration or promise of consideration expected or hoped for by any such person, including, but not limited to:

i) leniency, immunity, favorable treatment or recommendations with respect to any past, pending or potential criminal, parole, probation, pardon, clemency, civil, administrative, forfeiture, immigration, licensing or other matter involving local, state or federal government or quasi-governmental authority;

ii) relief from forfeiture, payments of money, rewards, fees, witness fees or special witness fees;

iii) provisions of food, clothing, transportation, legal services or other benefits;

iv) placement in a "witness-protection program";

v) letters to anyone informing the recipient of the witness's cooperation;

vi) recommendations concerning federal or state aid or benefits;

vii) recommendations concerning licensing, certification or registration;

viii) promises to take affirmative action to help the status of the witness in a profession, business or employment situation or promises not to jeopardize such status;

ix) aid or efforts in securing or maintaining the business or employment of a witness;

x) anything else that arguably could reveal an interest, motive or bias in the witness in favor of the prosecution or against the defendant, or could act as an inducement to testify, or could color the witness's testimony (*see People v. Grice*, 188 A.D.2d 397, 591 N.Y.S.2d 380 (1st Dept 1992);

7) A complete statement of any and all threats, whether express or implied, direct or indirect, or other coercion, directed against any prospective prosecution

witness, including, but not limited to, criminal prosecutions, forfeiture actions, or investigations; the probationary, parole, deferred prosecution or custodial status of any such witness; and any civil, tax court, court of claims, administrative, immigration, or other pending or potential legal disputes or transactions involving any such witness and the state or federal government or over which the state or federal government has real, apparent or perceived influence;

8) A copy of any and all medical and psychiatric reports or information, or records of hospitalization, including any history of alcoholism or substance abuse, known to the prosecution or that can reasonably become known to the prosecution concerning any prospective prosecution witness that arguably pertain to the witness's credibility or ability to perceive, comprehend or recall events;

9) Any written or oral statements made by any prospective prosecution witness that in any way contradict or are inconsistent with other written or oral statements he or she has made, and any such statements made by any person, whether a prospective prosecution witness or not, that in any way contradict or are inconsistent with such statements made by a prospective witness;

10) The same records and information specified in subparagraphs (1) through (9) with respect to each non-witness declarant whose statements will be offered in evidence at any pretrial hearing or at trial; and

11) Copies of any and all records of law enforcement or other governmental agencies reflecting intradepartmental disciplinary action taken against any law enforcement or agency official who will testify in this action, including all such records from any governmental agency for which the witness previously worked.

b. Pursuant to *People v. Rosario*, 9 N.Y.2d 286, 213 N.Y.S.2d 448 (1961), any and all prior statements, complete and without any redaction, of any prospective prosecution witness.

Demand is further made that any refusal to supply any of the requested material be made in writing, setting forth the grounds for such refusal, and that a copy of such writing be served upon me and filed with the Court within 15 days of receipt by you of this Demand for Discovery. *See* C.P.L. §§ 240.35 and 240.80.

DATED: NEW YORK, NEW YORK
May 25, 2005

Appendix E

RESPECTFULLY SUBMITTED,

STEVEN BANKS, ESQ.
The Legal Aid Society
49 Thomas Street
New York, NY 10013
Attorney for the Defendant

GERARD M. DEENIHAN, ESQ.
Of Counsel
(212) 298-5334

TO: ROBERT MORGENTHAU
District Attorney
New York County

EDWARD BUSSEY
Clerk, Supreme Court
New York County

APPENDIX F— AFFIRMATION IN RESPONSE TO THE PETITIONER'S OMNIBUS MOTION, FILED IN NEW YORK COUNTY SUPREME COURT ON JUNE 22, 2005

SUPREME COURT OF THE STATE OF NEW YORK COUNTY OF NEW YORK: PART 72

Indictment No. 01982-2005

PEOPLE OF THE STATE OF NEW YORK,

- against -

JOSE TOLENTINO,

Defendant.

AFFIRMATION IN RESPONSE TO THE DEFENDANT'S OMNIBUS MOTION

Joanne Li, an attorney admitted to practice before the Courts of this State, affirms under penalty of perjury that:

1. I am the Assistant District Attorney in New York County assigned to this case and am familiar with its facts.

2. This affirmation is submitted in response to the defendant's omnibus motion in which the defendant seeks inspection of the Grand Jury minutes and the dismissal of the indictment, pretrial discovery, suppression of identification testimony, suppression of

physical evidence, a Dunaway hearing, a Sandoval hearing, and in support of the People's request for reciprocal discovery.

PEOPLE'S RESPONSE TO THE DEFENDANT'S MOTION TO INSPECT THE GRAND JURY MINUTES AND TO DISMISS THE INDICTMENT

3. The People consent to the Court's *in camera* review of the Grand Jury minutes. Inspection will reveal that the evidence before the Grand Jury amply supports the offense(s) charged, that the Grand Jury was properly instructed on the law, and that the integrity of the proceedings was unimpaired. The People deny all allegations to the contrary and oppose disclosure of the Grand Jury minutes to the defense. The issues raised in the defendant's motion are straightforward, and disclosure is not necessary to their resolution CPL §210.30(3).

PEOPLE'S RESPONSE TO THE DEFENDANT'S MOTION FOR PRETRIAL DISCOVERY

4. The Voluntary Disclosure Form ("VDF") provides all of the pretrial discovery to which the defendant is entitled. As explained more fully below, the other items the defendant seeks are not discoverable. *See, People v. Colavito*, 87 N.Y.2d 423, 427 (1996) (items not enumerated in CPL §240 are not discoverable as a matter of right unless constitutionally or otherwise specially mandated); *See, Matter of Constantine v. Leto*, 77 N.Y.2d 975 (1991); *Matter of Miller v. Schwartz*, 72

N.Y.2d 869, 870 (1988) (discovery matters are "regulated by statute"; thus where a defendant has no statutory right to pretrial discovery, the defendant request should be denied).

5. The defendant seeks statements that the defendant made to persons other than law enforcement officials or their agents. Such statements and information related to them are not discoverable. *See* CPL §240.20(1)(a).

6. The defendant requests prior statements of the People's witnesses. These statements are not discoverable at this time. *See People v. Allen*, 108 A.D.2d 601, 602 (1st Dept. 1985) ("[t]here is no requirement that the People furnish *Rosario* material to a defendant prior to commencement of trial"). They will be provided to the defendant to the extent and at the time prescribed by law. *See* CPL §§240.44(1) and 240.45(1)(a).

7. The defendant requests numerous police reports. These reports are not discoverable at this time. *See* CPL §§240.20 and 240.45.

8. The defendant requests the personnel files of potential police witnesses. These files are not discoverable absent a showing of "some factual predicate which would make it reasonably likely" that the files contain impeachment material. *See People v. Gissendanner*, 48 N.Y.2d 543, 550 (1979); Civil Rights Law §50a. No such showing has been made in this case.

9. The defendant requests information regarding potential police witnesses and their investigative activities. This information is beyond the scope of pretrial discovery.

10. The defendant requests the names and addresses of the People's non-police witnesses. A witness list is not discoverable under CPL §240.20 and is not "other property" under CPL §240.40.

11. The defendant requests the dates of birth and/or criminal records of the People's non-police witnesses. These materials are also not discoverable at this time and will be provided as prescribed by law. *See* CPL §§240.44(2) (3) and 240.45(1) (b) (c).

12. The defendant requests evidence tending to impeach the People's non-police witnesses. Mere impeachment evidence is not the proper subject of pretrial discovery. *See* CPL §§240.20, 240.40.

13. The defendant requests exculpatory material within the meaning of *Brady v. Maryland*, 373 U.S. 83 (1963). The People are aware of their continuing duty under *Brady* to disclose exculpatory evidence to the defense and will honor that obligation.

Appendix F

PEOPLE'S RESPONSE TO THE DEFENDANT'S MOTION TO SUPPRESS IDENTIFICATION TESTIMONY

14. The People do not intend to introduce at trial testimony of any witness who previously identified the defendant. A *Wade* hearing is therefore unnecessary.

PEOPLE'S RESPONSE TO THE DEFENDANT'S MOTION TO SUPPRESS PHYSICAL EVIDENCE

15. As the VDF indicates, the People do not intend to offer at trial certain tangible evidence. A *Mapp* hearing is therefore unnecessary.

PEOPLE'S RESPONSE TO THE DEFENDANT'S DUNAWAY MOTION

16. The defendant has moved to suppress the DMV abstract of the defendant. The evidence was lawfully obtained, and the People deny all allegations to the contrary. Moreover, the defendant is not entitled to a hearing on the defendant's motion to suppress, because the defendant's motion does not establish a factual dispute requiring a hearing. *See* CPL §710.60(1); *People v. Mendoza*, 82 N.Y.2d 415 (1993); *People v. Marte*, 207 A.D.2d 314 (1st Dept. 1994) (suppression motion properly denied without a hearing when the defendant's allegations do not dispute the sufficiency of probable cause for the arrest). As the Court of Appeals has observed, a defendant's allegations, while facially sufficient, "may be inadequate when read in the context

of the case." *People v. Mendoza*, 82 N.Y.2d at 427. Here, the defendant fails to specifically deny the facts in this case. Notably, the defendant does not dispute the facts set forth in the case information sheet, complaint, VDF, and/or indictment. Plainly, however, those sources specified that the defendant was stopped for playing loud music from his vehicle. All of this information was "susceptible to denials that would have identified any issues warranting a hearing." *People v. Toxey*, 220 A.D.2d 204, 205 (1st Dept. 1995). The defendant's failure to deny the facts that establish probable cause "may be deemed a concession," and thus, a hearing is unnecessary. *People v. Mendoza*, 82 N.Y.2d at 428. Accordingly, the defendant's motion to suppress said abstract and for a *Dunaway* hearing should be denied.

17. The defendant has moved to suppress defendant's identity and documents independently kept by the Department of Motor Vehicles (hereinafter "DMV") that will be introduced at trial. In the alternative, the defendant has requested a *Dunaway* hearing on the suppression of this evidence. *Dunaway v. New York*, 442 U.W. 200 (1979). The People deny that the defendant was illegally stopped, apprehended, and/or arrested. However, even if defendant was illegally stopped, apprehended, or arrested, defendant's identity and the documents from DMV are not subject to the exclusionary rule. Therefore this evidence should not be suppressed.

18. The exclusionary rule was created to serve as a deterrent to illegal police conduct. The intent behind

the rule was to prevent law enforcement officials from using illegally obtained "fruits" against the defendant, and thus to prevent illegal police action by imposing a harsh and immediate sanction on law enforcement. *United States v. Crews*, 445 U.S. 463 (1980); *People v. Young*, 55 N.Y.2d 419, *cert. denied sub nom., Young v. New York*, 459 U.S. 848 (1982). However, before such a harsh sanction is imposed, the rule is balanced against the effect of the exclusion on the truth finding process. *People v. McGrath*, 46 N.Y.2d 12, 21 (1978), *cert. denied sub nom., McGrath v. New York*, 440 U.S. 972 (1979).

19. The rationale behind the balancing test has been outlined by the United States Supreme Court. "The 'body' or *identity* of a defendant ... is never itself suppressible as fruit of an unlawful arrest, even if it is conceded that an unlawful arrest, search, or interrogation occurred." *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1039 (1984) (emphasis added); *accord, United States v. Adegbite*, 846 F.2d 834, 838-39 (2nd Cir. 1988) (court refused to suppress defendant's name because a defendant's identity is not suppressible under the exclusionary rule); *United States v. Gonzalbo*, 946 F. Supp. 287, 289 (S.D.N.Y. 1996) (even if police learned defendant's identity as a result of an illegal stop of defendant's car, defendant's conviction for driving with a suspended license would be upheld because a defendant's identity is never suppressible under the exclusionary rule); *People v. Young*, 55 N.Y.2d 419, *cert. denied sub nom., Young v. New York*, 459 U.S. 848 (1982) (distinguishes between admissible observations by police during illegal arrest and inadmissible tainted

evidence recovered as result of illegal stop); *see also, Oliver v. United States*, 656 A.2d 1159, 1171 n.20 (D.C. App. 1995). Consequently, "there is no sanction to be applied when an illegal arrest only leads to discovery of the man's identity and that merely leads to the official file or other independent evidence." *United States v. Guzman-Bruno*, 27 F.3d 420, 422 (9th Cir. 1994) *cert. den.* (internal quotation marks omitted). Accordingly, because the motor vehicle records at issue here were obtained after the discovery of the defendant's identify which is not subject to suppression, those records should not be suppressed, irrespective of the legality of the stop.

20. Moreover, because the DMV records the defendant seeks to suppress were in the possession of a public agency before the defendant was stopped, apprehended, and/or arrested, they are not the product of the stop, apprehension or arrest, and should not be suppressed pursuant to the exclusionary rule. *See, United States v. Crews*, 445 U.S. 463, 475-77 & n.22 (1980) ("The exclusionary rule enjoins the government from benefitting from evidence it has unlawfully obtained; it does not reach backward to taint information that was in official hands prior to any illegality.") (plurality opinion); *People v. Pleasant*, 54 N.Y.2d 972, 974 n.* (1981) (photograph of defendant retrieved by the police from the Bureau of Criminal identification was not the fruit of defendant's illegal arrest because the photograph had been in the Bureau's files prior to the arrest), *cert. denied sub nom., Pleasant v. New York*, 455 U.S. 924 (1982); *People v. Bargas*, 101 A.D.2d 751, 752 (1st Dept. 1984) (computer record,

indicating car in which defendants had been driving was stolen, was not the fruit of the illegal stop because "the police computer's stolen car information had been independently compiled"); *People v. Smith*, 170 Misc.2d 486, (Crim. Ct. N.Y. Co. 1996) (holding that preexisting DMV records were not a suppressible fruit of an illegal car stop); *Bynum v. United States*, 274 F.2d 767, 767 (D.C. Cir. 1960) (fingerprint records of the defendant that predated his illegal arrest were not suppressible the fruit of that arrest); *State v. Levya*, 599 So.2d 691, 694 & n.7 (Fla. App. 3rd Dist. 1992) (preexisting public record that showed that defendant's driver's license had been suspended was not suppressible as the fruit of an illegal stop).

21. More importantly, the effectiveness of the exclusionary rule will not be diminished by excluding the DMV records from its application. In considering whether or not the exclusionary rule is applicable, "courts must 'weigh the likely social benefits of excluding unlawfully seized evidence against the likely costs.'" *People v. Cobb*, NYLJ, 12/3/97, p. 33, col. 5 (Crim. Ct. Kings Co.) (DiMango, J.) (citing *United States v. Janis*, 428 U.S. 433 (1976)). In *Cobb*, the court went through a thorough analysis as to whether or not the stop was illegal and, if it was, whether the records were subject to exclusion. Although, the *Cobb* court found the stop in that case to be proper, it added that even if the stop had been improper, the defendant's suppression motion should have been denied without a hearing. In reaching this conclusion, the court in *Cobb* reasoned, "where 'there is no sanction to be applied when an illegal

arrest only leads to a man's identity and that merely leads to the official file or other independent evidence,' then a fortiori, to require a hearing where the only issue to be determined is the admissibility of the DMV abstract is superfluous." *Id.* (citing *Hoonsilappa v. INS*, 575 F.2d 735, 738 (1978)). In *People v. Smith*, supra, the court actually found the automobile stop to be improper under *Ingle*, but still held that the records from DMV were admissible because they were clearly not the subject of the exclusionary rule. *Smith*, supra, at 316-17. *Contra*, *People v. Thomas*, 164 Misc.2d 721 (Crim. Ct. N.Y. Co. 1995) (Cataldo, J.); *People v. Rizwan*, 165 Misc.2d 985 (Crim. Ct. N.Y. Co. 1995) (Parker, J.).

22. In contrast, the court in *Thomas*, supra, held that suppression of DMV is the only sanction that will give effect to the exclusionary rule. In reaching this conclusion, the court in *Thomas* relied on *People v. Ingle*, 36 N.Y.2d 413 (1975). *Ingle*, however, deals with the legality of checkpoints, not whether or not evidence seized pursuant to an unlawful automobile stop is subject to the exclusionary rule. In fact, the court in *Cobb* reached the opposite conclusion after taking *Ingle* into account because of the fact that the People are already subject to significant sanctions resulting from improper automobile stops such as the suppression of post arrest statements, recovery of physical evidence and suggestive identification procedures. *Cobb*, supra. Moreover, the information obtained from DMV records will not be affected by the illegal police procedure -- the information existed before the improper stop and will continue to exist after it. *See, Young*, supra, at 425-26; *Cobb*, supra. Consequently, the sanction of suppressing

the defendant's identity and records generated by a non-police agency is extreme and of minimal deterrence.

23. For all the reasons stated above, the People respectfully request that this court follow the holdings in *Cobb*, supra, and *Smith*, supra, and deny defendant's motion to suppress defendant's identity and DMV records without a *Dunaway* hearing.

PEOPLE'S RESPONSE TO THE DEFENDANT'S REQUEST FOR SANDOVAL HEARING

24. The People respectfully request that this matter be deferred for consideration by the trial judge. Immediately prior to the commencement of trial, the People will provide notice of prior uncharged criminal, vicious, or immoral acts that the prosecutor intends to use at trial to impeach the credibility of the defendant. *See* CPL §240.43.

PEOPLE'S REQUEST FOR RECIPROCAL DISCOVERY

25. Pursuant to CPL §250.20, the People hereby demand that the defendant supply (a) the place or places where the defendant claims to have been at the time of the commission of the crime, and (b) the names, residential addresses, places of employment and addresses thereof of every alibi witness upon whom the defendant intends to rely to establish the defendant's presence elsewhere than at the scene of the crime at the time of its commission.

Appendix F

26. Pursuant to CPL §240.30(1), the People hereby demand that the defendant supply (a) any written report or document, or portion thereof, concerning a physical or mental examination, or scientific test, experiment, or comparisons, made by or at the request or direction of the defendant, if the defendant intends to introduce such report or document at trial, or if the defendant has filed a notice of intent to proffer psychiatric evidence and such report or document relates thereto, or if such report or document was made by a person, other than the defendant, whom the defendant intends to call as a witness at trial; and (b) any photograph, drawing, tape, or other electronic recording which the defendant intends to introduce at trial.

27. More than 30 days have elapsed since the defendant pleaded not guilty to the indictment and the defendant has not served notice of an intention to present psychiatric evidence at trial. Accordingly, the defendant should be precluded from presenting such evidence. *See*, CPL §250.10(2).

Wherefore, it is respectfully requested that, except as consented to herein, the defendant's motion should be denied.

Respectfully submitted,
/s/_____
Joanne Li
Assistant District Attorney
(212) 335-9174

Dated: New York, New York
June 20, 2005

APPENDIX G — OPINION OF THE NEW YORK COUNTY SUPREME COURT, ENTERED JULY 12, 2005

SUPREME COURT OF THE
STATE OF NEW YORK
COUNTY OF NEW YORK: PART 72

Indictment No.
1982/2005

THE PEOPLE OF THE STATE OF NEW YORK

- against -

JOSE TOLENTINO,

Defendant.

DECISION & ORDER

R. UVILLER, J.:

Defendant's motion for multiple relief is disposed of as follows:

Inspection of Grand Jury Minutes (and/or dismissal): The defendant's motion is granted solely to the extent of the Court reviewing the minutes of the proceedings

before the Grand Jury *in camera*. Upon its review of the Grand Jury minutes, the Court finds that sufficient evidence was presented by the People to the Grand Jury to sustain the indictment and that the Grand Jury proceedings were not otherwise defective or impaired. The defendant's request for release and inspection the Grand Jury minutes is denied.

Bill of Particulars and Discovery: The defendant's motion for a bill of particulars and discovery is granted to the extent supplied by the People. The bill of particulars and discovery provided by the People is deemed adequate. *However, if the defendant believes that any response to his demand for discovery or his request for a bill of particulars is inadequate, after conference with the assistant district attorney and his request for additional disclosure having been refused by the People, he may move to reargue within ten days of the service of a copy of this Decision and Order, by providing a written particularization setting forth the additional information that he seeks and the legal basis for the receipt of such information.* The People are reminded of their continuing obligation under *Brady v. Maryland* (373 U.S. 83). The defendant is directed to comply with the People's reciprocal demand for discovery. If the defendant objects to any part of the People's demand, he shall make a written objection and submit such to the Court within ten days of the service of a copy of this Decision and Order.

Motion to Suppress Statements and/or Huntley/ Dunaway Rearing: A hearing is granted with respect to both voluntariness and probable cause.

Appendix G

Motion to Suppress Tangible Evidence or Mapp Hearing: A *Mapp* hearing is **denied**. An individual does not possess a legitimate expectation of privacy in files maintained by the Department of Motor Vehicles and such records do not constitute evidence which is subject to suppression under a *fruit of the poisonous tree* analysis. See, *People v. Sajous*, 180 Misc.2d 693, *lv denied*, 93 NY2d 1026; *People v. Cobb*, 182 Misc.2d 188; *People v. Smith*, 170 Misc.2d 486, 492; *People v. Comas*, 2003 NY Slip Op 51067U (Crim. Ct NY County, June 26, 2003). See also, *United States v. Guzman-Bruno*, 27 F.3d 420, *cert denied* 115 S. Ct. 451.

Motion to Preclude Prior Bad Acts: The defendant's motion to preclude is denied. However, a *Sandoval* hearing is granted and shall be held by the trial court immediately prior to jury selection.

Application to File Additional Motions: The defendant's application to file additional motions is denied without prejudice. The defendant is granted leave to renew such application if the defendant can adequately demonstrate the necessity of such motion(s) pursuant to CPL §255.20(3).

This constitutes the Decision and Order of this Court.

DATED: July 12, 2005 /s/
RENA K. UVILLER, J.S.C.

PEOPLE: ADA Joanne Li
DEFENSE: Gerard M. Deenihan, Esq.

APPENDIX H — GUILTY PLEA PROCEEDING TRANSCRIPT, DATED AUGUST 3, 2005

[1] SUPREME COURT OF THE
STATE OF NEW YORK
COUNTY OF NEW YORK:
CRIMINAL TERM: PART: 72

Indictment No.: 1982/05

VTL 511.3A(3)

THE PEOPLE OF THE STATE OF NEW YORK

- against -

JOSE TOLENTINO,

Defendant.

Plea

100 Centre Street
New York, New York 10013
August 3, 2005

BEFORE:

HONORABLE RENA K. UVILLER,

Justice

Appendix H

APPEARANCES:

FOR THE PEOPLE:

ROBERT M. MORGENTHAU, ESQ.
District Attorney, New York County
One Hogan Place
New York, New York 10013
BY: JOANNE LI, ESQ.
Assistant District Attorney

FOR THE DEFENDANT:

THE LEGAL AID SOCIETY
49 Thomas Street
New York, New York 10013
BY: GERARD DEENIHAN, ESQ.

JACQUELINE RODRIGUEZ, CSR, RPR
Senior Court Reporter

[2] COURT CLERK: Calendar No. 15, Jose Tolentino.

MS. LI: Joanne Li, for the People.

MR. DEENIHAN: On behalf of Mr. Tolentino, Legal Aid Society, by Gerard Deenihan, D-E-E-N-I-H-A-N.

Good morning.

THE COURT: Good morning.

MR. DEENIHAN: Judge, I've spoken with Ms. Li, who is the assigned assistant on this case, and Mr. Tolentino is interested in disposing of this today.

MR. DEENIHAN: I would, if you'd like me to, and if you'd like to see the paperwork, I have it to give it to you.

Mr. Tolentino has appeared on all of his tickets. Thirty-eight of them have already been dismissed. He has dates to return on 21 more. It looks like they will all likely be dismissed. He has all the dates here.

THE COURT: So, in other words, he has been paying off those tickets?

MR. DEENIHAN: He hasn't been able to pay them off because DMV has been dismissing them. Thirty-eight have been completely dismissed. So, as such, he doesn't owe anything.

[3] He has dates to appear on 21 tickets. It looks like they will be dismissed.

THE COURT: They're dismissed on what ground?

MR. DEENIHAN: I think that part of it is that they're old. So, I'm not sure if the police are going to go forward on it or something along those lines, but I have all the paperwork showing the dismissals.

Appendix H

THE COURT: Ms. Li, do you have any position on this?

MR. DEENIHAN: Your Honor?

THE COURT: Have you looked at those dismissals?

MS. LI: No, I did not. However, I've had discussions with Mr. Deenihan about this.

Although they have been dismissed, it does not diminish the fact that his license was suspended, and suspended since 1983, for failure to answer summonses and failure to pay child support.

For this reason, the People are recommending a plea to the charge and six months jail.

MR. DEENIHAN: There is no issue about his license being suspended. Mr. Tolentino is finally on [4] his way to clearing up this matter.

I would ask that you consider something that doesn't involve incarceration, given that Mr. Tolentino has been out of trouble for 15 years.

In 1990, he had a misdemeanor conviction and a conditional discharge.

THE COURT: You think you're above the law?

Will you please stand, sir.

(Defendant complied.)

THE COURT: Do you think the law doesn't apply to you, that you can just not pay your tickets and not appear, you just walk on your merry way?

THE DEFENDANT: I've been paying all the tickets, your Honor.

THE COURT: This is what I'm going to do.

I will give him a probationary sentence, but it is going to be on the condition that he demonstrate to the probation department -- he does not have a license now; is that correct?

MR. DEENIHAN: That's correct.

THE COURT: I'm going to ask them to check with DMV. If you're caught behind the wheel of a car, if I accept this plea, I will put you in jail. If you get into a car again to drive it and you're stopped and I find out about it, which I will, I will [5] give you a jail sentence of up to four years.

Do you understand that?

THE DEFENDANT: Yes, your Honor.

THE COURT: With those conditions, is he ready to enter a plea?

Appendix H

(Defendant and Defense Counsel conferring.)

THE COURT: And his license has been suspended since when?

MS. LI: 1983, your Honor.

THE COURT: I just want to make it clear that if I accept this plea -- he's been driving.

The law requires you to have a license, and you won't get a license until you take care of your tickets.

If I accept this plea, and I'll have Probation check, and if I find out that you have been driving, they will notify me, you're going to be violated, and I'm going to put you in jail.

You are not to drive. You can take a taxi or walk if you want, but do not drive.

Do not get involved in this plea, sir, if you think you're going to get into a car and drive.

MR. DEENIHAN: This is just as long as his license is suspended?

THE COURT: Yes, that's correct.

[6] (Defendant and Defense Counsel conferring.)

THE COURT: If he's not interested, let's just set a trial date.

MR. DEENIHAN: He may be.

Could we possibly have a second call?

THE COURT: Second call this case. I have other things to do.

* * *

COURT CLERK: Recall on calendar No. 15, Jose Tolentino.

MR. DEENIHAN: Legal Aid Society, by Gerard Deenihan.

I've discussed the Court's offer with Mr. Tolentino. He's prepared to accept it.

At this time, after speaking with Mr. Tolentino, he has authorized me to withdraw any previously entered pleas of not guilty, and enter a plea of guilty, under Indictment 1982 of 2005, to the first count of VTL 511.3A(2), in full satisfaction of the indictment, with a term of probation as promised by the Court.

THE COURT: As I recall from this morning, if he is found driving a car before all of his suspensions are taken care of, he will face a prison sentence.

[7] Does he understand that?

MR. DEENIHAN: Yes.

THE COURT: Mr. Tolentino, will you please stand.

(Defendant complied.)

THE COURT: Your lawyer tells me that you wish to plead guilty; is that correct?

THE DEFENDANT: Yes.

THE COURT: Before taking a plea by you, I am required by law to explain and ask you some questions. If I ask you or say anything to you which you don't understand, tell me and I'll make it clear for you.

First of all, raise your right hand.

(Defendant sworn in.)

THE COURT: Okay. Thank you.

State your true and full name and your age.

THE DEFENDANT: Jose Tolentino. Forty-four.

THE COURT: Have you talked to your lawyer, Mr. Deenihan, about this decision to plead guilty?

THE DEFENDANT: Yes, I have.

THE COURT: Has anyone pressured you or forced you to get you to plead?

THE DEFENDANT: No.

[8] THE COURT: You understand this is a felony conviction under the Vehicle and Traffic Law, and if you ever get convicted of a felony, under the Penal Law it would be a mandatory state sentence.

Do you understand that?

THE DEFENDANT: Yes, ma'am.

THE COURT: By pleading guilty, you're giving up the right to have a jury decide this case; you're giving up the right to have witnesses come to court and testify against you and to be cross-examined by your lawyer; you're giving up any defenses or excuses you might have told to the jury; and, finally, if you went to trial, you could have remained silent and made the prosecutor prove the case against you.

If you plead guilty, you have to admit to this crime.

Do you understand that?

THE DEFENDANT: I understand.

THE COURT: You also understand that at trial you may not have been found guilty, but if you had been found guilty, you would have faced up to four years in prison.

Do you understand that?

THE DEFENDANT: Yes ma'am.

[9] THE COURT: If I take this plea, I'm going to watch this case.

Did I say deferral here or probation with a violation to be brought --

MR. DEENIHAN: I'm sorry?

THE COURT: I can't remember whether I said probation right off or a deferral.

MR. DEENIHAN: I believe you said probation, and during the probation if he was to drive with a suspended license --

THE COURT: All right. The promise will be a term of probation on two conditions.

First, that you not get arrested for anything in the meantime, and that you come back here on the day I tell you for the sentence to be imposed.

If you are arrested for anything, you're facing up to four years in state prison. You will not get your plea back.

Do you understand that?

THE DEFENDANT: Yes, ma'am.

THE COURT: And, lastly, when you're placed on probation, it will be a condition of probation that you're not to be behind the wheel of a car until it has been proved that all of your suspensions have been paid.

[10] Do you understand that?

THE DEFENDANT: Yes, ma'am.

THE COURT: And given your history, I'm warning you, Mr. Tolentino, you're not just going to get off scot-free. You will pay the price if I find out that you're driving again.

Do you have any questions?

THE DEFENDANT: No.

THE COURT: You're charged with aggravated unlicensed operation of a motor vehicle.

The indictment alleges that in New York County, on January 1, 2005, you operated a motor vehicle while having, in effect, ten or more suspensions that were imposed on at least ten different dates for failure to answer these summonses or pay a fine.

Do you understand what you're accused of?

THE DEFENDANT: Yes, ma'am.

THE COURT: How do you plead to this unclassified C felony; guilty or not guilty?

THE DEFENDANT: Guilty.

THE COURT: Please listen to the clerk.

COURT CLERK: Mr. Tolentino, do you now withdraw your previously entered plea of not guilty, and do you now enter a plea of guilty to aggravated [11] unlicensed operation of a motor vehicle in the first degree, to satisfy Indictment 1982 of 2005?

Is that your plea, guilty?

THE DEFENDANT: Yes.

MR. DEENIHAN: How's 9/28?

THE COURT: Let's see. September 28th is fine.

MR. DEENIHAN: Thank you.

* * *

I, Jacqueline Rodriguez, a Certified Shorthand Reporter, in and for the State of New York, do hereby certify that the foregoing transcript is true and accurate to the best of my knowledge, skill, and ability.

/s/_____
Jacqueline Rodriguez, CSR, RPR
Senior Court Reporter

APPENDIX I — SENTENCING TRANSCRIPT, DATED SEPTEMBER 28, 2005

[1] SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NEW YORK, PART 72

Indictment No. 1982/05

PEOPLE OF THE STATE OF NEW YORK,

- vs. -

JOSE TOLENTINO,

Defendant.

September 28th, 2005
100 Centre Street
New York, N.Y.

BEFORE:
HONORABLE RENA K. UVILLER, J.S.C.

APPEARANCES:

For the People:
ROBERT MORGENTHAU, ESQ.,
New York County District Attorney
One Hogan Place
New York, New York 10013
BY: DAISY MEJIA, ESQ.,
Assistant District Attorney

For the Defendant:
LEGAL AID SOCIETY
49 Thomas Street
New York, New York 10013
BY: GERARD DENNEHAN, ESQ.

[2] THE CLERK: Number 41, from the audience, Jose Tolentino.

MS. MEJIA: Daisy Mejia for the People.

MR. DENNEHAN: Legal Aid Society by Gerard Dennehan.

THE COURT: Mr. Dennehan, Miss Mejia, I would want you to come up for a moment.

(WHEREUPON, counsel for both sides approached the bench and a sidebar discussion was conducted off the record, after which the following occurred in open court:)

THE COURT: Proceed to sentence.

THE CLERK: Mr. Tolentino, you're before the Court for sentencing following your conviction by plea to the charge of Aggravated Unlicensed Operation of a Motor Vehicle in the First Degree. Before being sentenced --

THE COURT: Would you please stand.

THE CLERK: -- before being sentenced, the Court will allow you, your attorney and the district attorney an opportunity to address the Court with any matter relevant to sentence.

People.

MS. MEJIA: People rely upon the [3] sentence.

THE COURT: Mr. Dennehan, anything that you and or Mr. Tolentino wish to add?

MR. DENNEHAN: No.

THE COURT: I am placing Mr. Tolentino on probation for five years.

There's a mandatory $500.00 fine that goes with this and the condition is he is not to be driving a car for the next five years.

Do you understand that? Unless he's paid every single one of his summonses. If he is arrested for unlicensed operation during this next period of time, I will give you a prison sentence. Do you understand that?

THE DEFENDANT: I would like to say something, Mr. Dennehan didn't say anything.

MR. DENNEHAN: He just wants to say all the tickets have been dismissed.

THE COURT: If they have, that's one thing. If they haven't and you are behind the wheel of a car and you're arrested for unlicensed operation of a motor vehicle, that would be a violation of probation and you'll get a prison sentence.

Five years probation and $500.00 fine.

[4] MR. DENNEHAN: At this time I'm handing Mr. Tolentino his right to appeal.

(WHEREUPON, the sentence in this matter is concluded.)

CERTIFIED TO BE A TRUE
AND ACCURATE TRANSCRIPT

/s/

GLENN GREENSPAN,
Senior Court Reporter

APPENDIX J — OPINION OF THE NEW YORK STATE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT, ENTERED FEBRUARY 24, 2009

NEW YORK STATE SUPREME COURT,
APPELLATE DIVISION, FIRST DEPARTMENT

Gonzalez, J.P., Sweeny, Renwick, Freedman, JJ.

Ind. 1982/05

The People of the State of New York,

Respondent,

-against-

Jose Tolentino, etc.,

Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (Kristina Schwarz of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Allen J. Vickey of counsel), for respondent.

Judgment, Supreme Court, New York County (Rena K. Uviller, J.), rendered September 28, 2005, convicting defendant, upon his plea of guilty, of aggravated unlicensed operation of a motor vehicle in the first degree, and sentencing him to a term of 5 years' probation, unanimously affirmed.

Appendix A

The court properly denied, without granting a hearing, defendant's motion to suppress Department of Motor Vehicles records relating to the suspension of his driver's license. Defendant moved to suppress these records as fruits of an allegedly unlawful vehicular stop, during which the police obtained defendant's pedigree information and thereby obtained his DMV information through a computer check.

Although a defendant need not establish a privacy interest in an alleged fruit of a preexisting violation of his or her Fourth Amendment rights, we agree with those courts (*see e.g. People v. Cobb*, 182 Misc 2d 808 [Crim Ct, Kings County 1997]) that have concluded that DMV records are not suppressible fruits. "The ... identity of a defendant ... is never itself suppressible as a fruit of an unlawful arrest ..." (*Immigration & Naturalization Serv. v. Lopez-Mendoza*, 468 US 1032, 1039 [1984]). Thus, "there is no sanction to be applied when an illegal arrest only leads to discovery of [a person's] identity and that merely leads to the official file" (*United States v. Guzman-Bruno*, 27 F3d 420, 422 [9th Cir 1994], *cert denied* 513 US 975 [1994] [internal quotation marks omitted]). Furthermore, the DMV records were compiled independently of defendant's arrest (*see People v. Pleasant*, 54 NY2d 972, 973-974 [1981], *cert denied* 455 US 924 [1982]; *People v. Bargas*, 101 AD2d 751, 752 [1984]).

We perceive no basis for reducing the sentence.

Appendix J

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: FEBRUARY 24, 2009

/s/
CLERK

APPENDIX K — OPINION OF THE NEW YORK COURT OF APPEALS, ENTERED MARCH 30, 2010

COURT OF APPEALS OF NEW YORK

People v. Tolentino
14 N.Y.3d 382, 900 N.Y.S.2d 708
NY, 2010.

14 N.Y.3d 382926 N.E.2d 1212, 900 N.Y.S.2d 708,
2010 WL 1189408, 2010 N.Y. Slip Op. 02643

The People of the State of New York,

Respondent,

v.

Jose Tolentino, Also Known as Jose R. Tolentino,

Appellant.

Argued February 10, 2010
Decided March 30, 2010

OPINION OF THE COURT

Read, J.

At about 7:40 p.m. on New Year's Day in 2005, defendant Jose Tolentino was driving a car in the vicinity of West 181st Street and Broadway in New York City. The police stopped him for playing music too loudly, learned his

name, and ran a computer check of Department of Motor Vehicles (DMV) files to look up his driving record. When this check revealed that defendant's license was suspended with at least 10 suspensions imposed on at least 10 different dates, he was arrested and charged with one count of aggravated unlicensed operation of a motor vehicle in the first degree.

As part of an omnibus motion, defendant sought to suppress his driving record and any statements made after arrest; alternatively, he asked Supreme Court to hold a *Mapp/Dunaway* and/or a *Huntley/Dunaway* hearing. Defendant alleged that the police unlawfully stopped his car and illegally obtained his driving record from DMV. Specifically, he contended that his driving record was a suppressible fruit of a Fourth Amendment violation because "[t]he steps required to obtain a DMV records check are the stop of the vehicle and the elicitation of the driver's name or the driver's license number." As a result, defendant argued, "[b]ut for defendant's unlawful seizure by the police, his DMV records would not have been obtained in this case, and they are therefore the fruit of the police illegality." The People opposed the motion, first on the ground that the stop was legal; second, they took the position that, even if the stop were, in fact, illegal, a defendant's identity is never a suppressible fruit, and, in any event, a public agency possessed the records.

On July 12, 2005, Supreme Court granted defendant's motion for a *Huntley/Dunaway* hearing, but denied his request for a *Mapp* hearing. The judge held that "[a]n

individual does not possess a legitimate expectation of privacy in files maintained by the [DMV] and such records do not constitute evidence which is subject to suppression under a *fruit of the poisonous tree* analysis." On August 3, 2005, defendant pleaded guilty to the crime charged in exchange for five years' probation; on September 28, 2005, Supreme Court sentenced him as promised.

Defendant appealed, claiming that because his driving record was suppressible, he was entitled to a remand for a hearing. The Appellate Division disagreed and unanimously affirmed (59 AD3d 298 [1st Dept 2009]). The court relied on the United States Supreme Court's decision in *INS v. Lopez-Mendoza* (468 US 1032, 1039 [1984]) for the proposition that the identity of a defendant is never suppressible as the fruit of an unlawful arrest. And because defendant's identity led to the discovery of his DMV records, those records were likewise not suppressible. Finally, the Appellate Division noted that the records had been compiled independently of defendant's arrest. A Judge of this Court granted defendant permission to appeal (12 NY3d 860 [2009]), and we now affirm.

In *INS v. Lopez-Mendoza* (468 US at 1039) the Supreme Court held that the "'body' or identity of a defendant ... in a criminal or civil proceeding is never itself suppressible as a fruit of an unlawful arrest, even if it is conceded that an unlawful arrest, search, or interrogation occurred." A contrary holding would "permit[ ] a defendant to hide who he is [and] would

undermine the administration of the criminal justice system" (*United States v. Farias-Gonzalez*, 556 F3d 1181, 1187 [11th Cir 2009]). Accordingly, defendant does not argue that his name or identity would be subject to suppression as a fruit of the allegedly unlawful stop. Rather, he claims that the preexisting DMV records are subject to suppression because without the alleged illegality, the police would not have learned his name and would not have been able to access these records.

Federal circuit courts addressing this issue in the context of those suspected of illegally residing in the country have held that, when the police stop or seize a defendant, learn his or her name, and use that name to check preexisting government immigration files, the records are not subject to suppression (*United States v. Farias-Gonzalez*, 556 F3d at 1189; *United States v. Bowley*, 435 F3d 426, 430-431 [3d Cir 2006]; *United States v. Roque-Villanueva*, 175 F3d 345, 346 [5th Cir 1999]). For example, in *Hoonsilapa v. Immigration & Naturalization Serv.* (575 F2d 735, 737 [9th Cir 1978]), the government sought to deport an alien after learning from his INS administrative file that he was in the country illegally. The alien moved to suppress the file, arguing that it was the "fruit" of an illegal search and arrest (*id.*). The Ninth Circuit rejected the argument, noting that the alien's INS file was already in the possession of the government at the time of the purportedly illegal arrest and search, and that the government's "decision to search the INS files was only the 'product' of the discovery of [the alien's] identity during the illegal arrest and search" (*id.* at 738). The

court emphasized that "the mere fact that Fourth Amendment illegality directs attention to a particular suspect does not require exclusion of evidence subsequently unearthed from independent sources" *(id.)*.

The facts here are analogous. The officers learned defendant's identity when they stopped his car; that knowledge permitted the police to run a computer check that led to the retrieval of defendant's DMV records. Under the rationale of *Lopez-Mendoza* and the above federal circuit court decisions, defendant's DMV records were therefore not suppressible as the fruit of the purportedly illegal stop. In short, "there is no sanction ... when an illegal arrest only leads to discovery of the man's identity and that merely leads to the official file or other independent evidence" *(United States v. Guzman-Bruno*, 27 F3d 420, 422 [9th Cir 1994] [citation and internal quotation marks omitted]).

While not forming an independent basis for this outcome, the result is further supported by the nature of the records at issue, which were public records already in the possession of authorities (*United States v. Crews*, 445 US 463, 475-477 and 475 n 22 [1980 plurality op] ["(t)he exclusionary rule enjoins the Government from benefiting from evidence it has unlawfully obtained; it does not reach backward to taint information that was in official hands prior to any illegality"]; *see also Matter of Jason W.*, 272 AD2d 214 [1st Dept 2000]; *People v. Bargas*, 101 AD2d 751, 752 [1st Dept 1984]).

Appendix K

In *People v. Pleasant* (54 NY2d 972 [1981]), we applied similar principles to deny exclusion of independently-compiled information in the possession of a public agency. There, the defendant was illegally arrested in Suffolk County for weapon possession, at which time the police discovered that one of the guns recovered during the unlawful arrest had been used in a robbery in Bronx County. Suffolk County authorities conveyed this information, along with the defendant's name and date of birth, to the Bronx police. The Bronx police then retrieved the defendant's photograph from the Bureau of Criminal Identification and showed it to the robbery victims, who positively identified the defendant from a photographic array. After the defendant was arrested on a warrant, one of the robbery victims identified him in a lineup.

We rejected the defendant's claim that the photographic identifications should be suppressed as the fruit of the illegal arrest, holding that "only defendant's identity was obtained as a result of the unlawful seizure" and the photographic identifications "were not an exploitation of the antecedent illegality, as defendant's photograph was obtained from a source independent of the unlawful arrest, and such identifications proceeded from the witnesses' independent recollections" *(Pleasant* at 974 and n [citation omitted]). Similarly, the DMV records here were obtained by the police from a source independent of the claimed illegal stop.

As the *Farias-Gonzalez* court pointed out, the policy rationale of the exclusionary rule would not be served

by its application to identity-related evidence. The social costs of excluding such evidence are great: courts and the government are entitled to know who defendants are, since permitting defendants to hide their identity would undermine the administration of the criminal justice system and essentially allow suppression of the court's jurisdiction. On the other side of the equation, there are few deterrence benefits. The Constitution does not prohibit the government from requiring a person to identify himself to a police officer. In addition, "even if a defendant in a criminal prosecution successfully suppresses all evidence of his identity and the charges are dropped, the Government can collect new, admissible evidence of identity and reindict him. This is so because identity-related evidence is not unique evidence that, once suppressed, cannot be obtained by other means" (*Farias-Gonzalez*, 556 F3d at 1188-1189 [citation omitted]).

As a result, "[t]he application of the exclusionary rule to identity-related evidence will have a minimal deterrence benefit, as its true effect will often be merely to postpone a criminal prosecution" (*id.* at 1189).

Nor do we believe that "[t]oday's opinion [will] give[ ] law enforcement an incentive to illegally stop, detain, and search anyone for the sole purpose of discovering the person's identity and determining if it matches any government records accessible by the police" (dissenting op at 390). Police are already deterred from conducting illegal car stops because evidence recovered in the course of an illegal stop remains subject to the exclusionary rule.

Appendix K

While the Supreme Court has held that fingerprint evidence——evidence the dissent describes as "paradigmatic identity evidence" (dissenting op at 389)- may be subject to the exclusionary rule (*Davis v. Mississippi*, 394 US 721, 724 [1969]), *Davis*, as well as *Hayes v. Florida* (470 US 811, 815 [1985]), is distinguishable from this case in two ways. First, the defendants in those cases were illegally stopped for the purpose of obtaining evidence—fingerprints- that would connect the defendants to crimes under investigation. The "identity evidence" was not preexisting. Second, the fingerprints were used, not to establish the identities **5 of the individuals apprehended by the police and subject to the jurisdiction of the court, but to connect those individuals' fingerprints to latent prints recovered from the crime scene. The evidence established defendants' "identities" as the perpetrators, but not their "identities" in the sense relevant here. Our decision today would not alter the outcome of those cases. We merely hold that a defendant may not invoke the fruit-of-the-poisonous-tree doctrine when the only link between improper police activity and the disputed evidence is that the police learned the defendant's name.

Accordingly, the order of the Appellate Division should be affirmed.

Ciparick, J. (dissenting). Because I believe that Department of Motor Vehicles (DMV) records are subject to suppression if obtained by the police through the exploitation of a Fourth Amendment violation, namely an unlawful traffic stop, I respectfully dissent.

Appendix A

The majority has set forth a new rule, that regardless of police conduct, DMV records obtained through a police stop and inquiry of the driver are not subject to the exclusionary rule when the only link between the police conduct and the evidence is that the police learned a defendant's name (*see* majority op at 388). Further, the majority believes that DMV records are not subject to suppression since they are government records compiled independently of defendant's arrest. We disagree on both counts.

It has long been established that evidence derived from a Fourth Amendment violation must be suppressed as "fruit of the poisonous tree" if law enforcement "'exploited or benefited from its illegal conduct' such that 'there is a connection between the violation of a constitutional right and the derivative evidence'" (*People v. Jones*, 2 NY3d 235, 242 [2004] [citations omitted]). We have never before excluded any category of evidence from this rule. Fruit of the poisonous tree may be anything "of evidentiary value" (*Davis v. Mississippi*, 394 US 721, 724 [1969], quoting *Bynum v. United States*, 262 F2d 465, 467 [DC Cir 1958]), including fingerprints (*id.*), photographs (*United States v. Crews*, 445 US 463, 472 [1980]), and identifications (*People v. Gethers*, 86 NY2d 159, 162 [1995]).

The majority relies heavily on a misreading of *INS v. Lopez-Mendoza* (468 US 1032 [1984]). In that case, the United States Supreme Court reviewed two civil deportation proceedings that resulted from illegal police conduct. In the first case, Adan Lopez-Mendoza raised

a jurisdictional issue, that he had been summoned to the deportation proceeding as a result of an unlawful arrest. He did not challenge the admissibility of the evidence proffered against him. In the companion case, Elias Sandoval-Sanchez challenged the introduction of illegally obtained evidence in his deportation proceeding. With respect to Lopez-Mendoza's claim, the Court wrote that "[t]he 'body' or identity of a defendant or respondent in a criminal or civil proceeding is never itself suppressible as a fruit of an unlawful arrest" (*id.* at 1039). The Fourth, Eighth, and Tenth Circuits read this language as referring only to the court's personal jurisdiction over Lopez-Mendoza, not admissibility of identity evidence (*see United States v. Oscar-Torres*, 507 F3d 224, 227-230 [4th Cir 2007]; *United States v. Olivares-Rangel*, 458 F3d 1104, 1111-1112 [10th Cir 2006]; *United States v. Guevara-Martinez*, 262 F3d 751, 753-755 [8th Cir 2001]). I agree with these courts.

There are several reasons why this reading of *Lopez-Mendoza* is more persuasive than the reading given by the majority. Most importantly, the authority cited for the proposition that a defendant's identity cannot be suppressed refers to an older rule, undisputed here, that the identity of a defendant is never suppressible so as to defeat a court's jurisdiction over that defendant (*Lopez-Mendoza*, 468 US at 1039-1040, citing *Gerstein v. Pugh*, 420 US 103, 119 [1975] and *Frisbie v. Collins*, 342 US 519, 522 [1952]). As such, the *Lopez-Mendoza* language at issue is found in the section of the opinion addressing Lopez-Mendoza's jurisdictional claim. The Court later addressed Sandoval-Sanchez's claim that the

specific identity evidence against him should be suppressed. Rather than applying any "identity rule," as it had when addressing Lopez-Mendoza's jurisdictional claim, the Court held that the exclusionary rule did not extend to deportation proceedings—purely civil proceedings determining a person's eligibility to stay in this country.

I agree with the majority that a defendant's identity cannot be suppressed to defeat the personal jurisdiction of a court. However, identity-related evidence can and should be subject to the exclusionary rule. Indeed, the United States Supreme Court has twice found that fingerprints—paradigmatic identity evidence—are suppressible under the exclusionary rule (*Davis*, 394 US at 724; *Hayes v. Florida*, 470 US 811, 815 [1985]). In *Davis*, the Court held that because "[f]ingerprint evidence is no exception" to the exclusionary rule, defendant's illegally obtained fingerprints that matched the perpetrator's fingerprints on file should have been suppressed (394 US at 724). The Court reaffirmed *Davis* in *Hayes* and found that a defendant's fingerprints taken for an investigative purpose in the course of an unlawful detention were inadmissible fruit of that detention (470 US at 816).

Certainly the deterrent purpose of the exclusionary rule should be applicable to identity-related evidence. The majority's "broad[ ] reading of *Lopez-Mendoza* [gives] the police carte blanche powers to engage in any manner of unconstitutional conduct so long as their purpose [is] limited to establishing a defendant's identity" (*Olivares-*

Rangel, 458 F3d at 1111). Today's opinion gives law enforcement an incentive to illegally stop, detain, and search anyone for the sole purpose of discovering the person's identity and determining if it matches any government records accessible by the police. Permitting law enforcement to exploit a Fourth Amendment violation that produces identity or identity-related evidence misses the point; what matters is the legality of the police conduct, not the type of evidence obtained.

Of course, this does not mean that identity-related evidence will necessarily be excluded, even if it is the product of an unlawful stop, but merely that it is subject to the same rules as other evidence. It may indeed be admissible, along with other evidence secured as a result of acquiring defendant's pedigree information, if there is an independent source, discovery was inevitable, or the evidence is attenuated from the illegality (*Gethers*, 86 NY2d at 162). If none of these exceptions apply, the records obtained as a result of identity information acquired during an illegal stop are suppressible. Here, however, because Supreme Court made no determination regarding the legality of the stop, we are in no position to determine whether the proffered evidence should be suppressed.

The majority's second argument-that the DMV records are not subject to the exclusionary rule because they were compiled by a state agency independent of any illegality—ignores that the police located these specific records only by relying on identifying information that may have been the product of an illegal stop. Contrary

to the majority's opinion, our holding in *People v. Pleasant* (54 NY2d 972, 974 [1981]) does not suggest that evidence in possession of a government agency is immune from the exclusionary rule's constraints. In fact, *Pleasant* was entirely premised on the identification at issue being "'sufficiently distinguishable to be purged of the primary taint'" (*id.*, quoting *Wong Sun v. United States*, 371 US 471, 488 [1963] [some internal quotation marks omitted]). In other words, far from holding that identity-related evidence was not subject to suppression, *Pleasant* actually applied the *Wong Sun* analysis and found the evidence at issue to be sufficiently attenuated so as to be admissible. A similar analysis should have been conducted here.

Nor should it matter that the records were public. Defendant here need not establish a legitimate expectation of privacy in the evidence he seeks to suppress, but only that police discovery of the evidence was the product of a Fourth Amendment violation (*see* Kamins, New York Search and Seizure § 1.01 [5] [a], at 1-22 [2009] [compiling lower court decisions that defendant need not have a "reasonable expectation of privacy in the fruit itself"]). Supreme Court below therefore should have considered "whether exploitation of an illegal search and seizure produced the critical link between a defendant's identity and his [government agency] record[s]" (*Olivares-Rangel*, 458 F3d at 1120).

In short, if these DMV records were discovered as a result of an allegedly unlawful stop, they should be subject to suppression as fruit of that illegality. I would

reverse the order of the Appellate Division and remit to Supreme Court for a *Mapp/Dunaway* hearing.

Judges Graffeo, Smith, Pigott and Jones concur with Judge Read; Judge Ciparick dissents and votes to reverse in a separate opinion in which Chief Judge Lippman concurs.

Order affirmed.

Copr. (c) 2010, Secretary of State, State of New York
NY, 2010.
PEOPLE v. TOLENTINO
14 N.Y.3d 382